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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

VICTOR ARDITTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Mr. Arditti's conviction must be reversed based on this Court's recent decision in *Jacobson v. United States*, ___ U.S. ___, 112 S.Ct. 1535 (1992), because the Government failed to present any evidence of his predisposition to commit an offense prior to the contact and inducements of the government agent.

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PETITION FOR WRIT OF CERTIORARI

Victor Arditti, the Petitioner, by and through his attorneys of record, hereby petitions this Court to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The opinion of the district court in denying judgment of acquittal in *United States v. Victor Arditti*,[1] No. EP-89-CR-399, entered on September 20, 1990, is reproduced

[1] There were three individuals named in the indictment: Victor Arditti, Guillermo Avila and Gabriel Yañez.

herein at App. 40. The opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. Arditti*,[2] No. 90-8646 (reported at 955 F.2d 331 (5th Cir. 1992)), entered on February 27, 1992, is reproduced herein at App. 1. The denial of rehearing entered by that court on June 2, 1992, is reproduced herein at App. 39.

STATEMENT OF JURISDICTION

Mr. Arditti seeks review of the judgment of the United States Court of Appeals entered on February 27, 1992. That court denied rehearing on June 2, 1992. This petition is timely filed within ninety days of the denial of the petition for rehearing. Mr. Arditti seeks review by this Court pursuant to the jurisdiction granted by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Introduction

When the United States Court of Appeals for the Fifth Circuit entered its opinion below, this Court had not issued the opinion in *Jacobson v. United States*, ___ U.S.___, 112 S.Ct. 1535 (1992). The opinion in *Jacobson* was issued while rehearing was pending in the lower court, but that court declined to rehear this case.

[2] The two appellants were Victor Arditti and Guillermo Avila.

Victor Arditti is a fifty-eight-year-old attorney and lifelong resident of El Paso, Texas. Prior to the indictment herein, he had an unblemished reputation in the community. He had no criminal record, nor was there any suspicion that he had ever engaged in criminal activity.

Mr. Arditti was the victim of a government sting operation, set forth in more detail below. After his initial declination of the undercover agent's proposals, Mr. Arditti was subjected to more frequent and intense pressure than was the defendant in *Jacobson*, with less apparent incentive on the Government's part. Most significantly, the Government introduced *no* evidence of predisposition prior to the contact and inducements of the government agent.

Procedural History

Victor Arditti was charged with Gabriel Yañez and Guillermo Avila in Count One of the indictment with conspiracy to fail to file certain currency transaction reports and to launder monetary instruments in violation of 18 U.S.C. §§ 371 and 1956(a)(3), and 31 U.S.C. §§ 5313 and 5316. He was also charged with five substantive money laundering offenses (Counts Twelve, Fourteen, Fifteen, Sixteen and Eighteen), in violation of 18 U.S.C. § 1956(a)(3).

At trial, Mr. Arditti asserted an entrapment defense, and the jury was so instructed. The jury returned a verdict of guilty as to all counts. Thereafter, a post-trial motion for judgment of acquittal was denied, and Mr. Arditti was sentenced to eighteen months imprisonment. Mr. Arditti's conviction was affirmed by the United States

Court of Appeals for the Fifth Circuit, and rehearing was denied. This petition followed.

Statement of Facts

With one exception,[3] the meetings and phone calls with the undercover agent were tape recorded. Therefore the substance of the contacts between the parties are for the most part undisputed. Although the facts have been abbreviated, the relevant ones are still lengthy. An in depth examination here is necessary, however, because without the reproduction of the detail, the Government's conduct would be almost unbelievable.

An undercover Internal Revenue Service Special Agent named Gary Gallman began this investigation in May of 1988. Agent Gallman approached Gabriel Yañez, who was suspected by the Government of money laundering. The two of them engaged in some currency transfers that could be construed as money laundering. In the course of those transactions, Yañez failed to file the currency transaction reports that were required of him.

In September of 1988, when Agent Gallman asked for an introduction to an attorney, Yañez introduced him to Victor Arditti. Yañez testified that he understood Gallman to be requesting an introduction to a criminal defense lawyer (XIII R. 647).[4] Gallman testified that he asked to meet someone to help him with his business in El Paso

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[3] This rather important exception, the March 30, 1989, meeting, is discussed *infra* at 9.

[4] The reference is to the record in the court below, which is not presently before this Court.

(App. 3), but he also testified that it was clear to him that Yañez wanted him to use Arditti for criminal defense matters only (XII R. 451).

Prior to this initial meeting, the Government had no evidence that Victor Arditti had ever been involved in criminal activity or was likely to ever be involved in any criminal activity in the future. At a pretrial hearing, when defense counsel inquired whether the Government had any information that Arditti had engaged in money laundering related activities in the past, the attorney for the Government responded, "No. Absolutely not." (IV R. 3). The undercover agent, in his testimony at trial, confirmed that the Government had no indication that Mr. Arditti was involved in any criminal activity (XII R. 424).[5]

The bulk of the meetings with the undercover agent were tape recorded, so there is little dispute about what was said by whom. When Mr. Arditti first met with the undercover agent, he made it very clear that he could *not* commit a crime. Mr. Arditti believed he had been asked, as a criminal defense attorney, to meet with the undercover agent. The following exchange indicates that Mr. Arditti was interested in doing only legal work for Agent Gallman (using the name Adams):

Adams: One of the reasons that I'm here today is because I have never

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[5] Mr. Arditti's clean record was further substantiated by the character evidence he presented: a local attorney, an agent with the Drug Enforcement Administration, a Federal probation officer and a bishop all testified that they had known Mr. Arditti for many years and that he was a good, honest and law-abiding man (XII R. 660-719).

stepped foot in a courtroom and I hope to hell I never do step foot in a courtroom. But I hope . . . That's one of the reasons that maybe you can help me and be there if something does go wrong.

Arditti: If something happens to you, all you have to do is pick up the phone and call me. I cannot tell you how to avoid the government. I cannot tell you how to practice what you're doing, because then I would giving you advice contrary to the canons of ethics. I can't tell you to go ahead and launder your money here, or tell you to go do this over here, I can't tell you, "Buy it from so-and-so, and then move it to somebody else," because I would then be a part of what you are, and therefore, there would be a total conflict and be a violation of my ethics. Now, whatever you do, you do. You get caught, I'll represent you. Something happens to you somewhere in some federal court, I don't care where it is, if it's in Miami . . .

Adams: You'll come.

Arditti: I will come.

Government's Exhibit (GE) 29A, at 7-8.

In that meeting, Mr. Arditti reiterated his unwillingness to break the law, telling Agent Gallman, "I can't

advise you how to launder your money or anything. . . . " *Id.* at 10. When the agent suggested that he was interested in hiring Arditti in the future, if and when he got into criminal trouble, Mr. Arditti said he would represent him in that event, but *again* added, "But if these funds are illegal funds, I can't tell you what to do with them." *Id* at 12.

Later the agent again turned the discussions toward financial transactions, asking Mr. Arditti if he could help him make investments. *Id.* at 13. Mr. Arditti responded, "There's nothing wrong with making a legal transaction whatsoever." *Id.* In response to the agent's stated concern about his fee, Mr. Arditti added:

> You come down here and you want to buy a house, we'll charge you what we charge everybody else. We don't add one nickel more than anybody else in town, Well, why should we?"

Id. at 21.

When the agent expressed his unwillingness to finance a real estate purchase through a bank, Mr. Arditti suggested buying real estate financed by the owner. *Id.* at 23-25.

Mr. Arditti certainly did not jump at the chance to commit an offense at the first meeting on September 21st. Neither did he display a predisposition to commit an offense. The most incriminating evidence produced at this meeting was Mr. Arditti's comment about how to buy a house without using a bank. At trial, the Government suggested that this was evidence of predisposition.

Agent Gallman testified that he brought up the purchase of real estate because he was trying to find out:

> for our knowledge what his role was, what type of advice he would give – if he'd be willing to advise me and help me structure a purchase of property knowing that the funds were illegal.

VIII R. 183. Gallman testified that Mr. Arditti clearly understood what the problem with banks was (VIII R. 184).

However, an unbiased review of the actual conversation leads to a different conclusion. When the agent asked if substantial investments in the area would cause problems for him, Mr. Arditti responded, "Why should it?" GE 29A at 22. The clearest contradiction of Agent Gallman's testimony on direct is the following exchange on the tape:

Adams:	We don't get loans at the banks. You understand that, don't you?
Arditti:	Well, no. . . .

Id. at 23.

On cross-examination, Agent Gallman had to admit that Mr. Arditti's owner financing suggestion did not appear to be a money laundering scheme (XII R. 443-44). In fact, Gallman was not sure what to make of Arditti's behavior, because Arditti said he could not launder money, but could advise on legal investments (XII R. 442). The meeting ended without any agreement that Arditti would see Gallman again.

Yañez, however, continued to do business with Gallman. On two occasions, in October and November of that

year, Gallman asked Yañez to involve Arditti in their illegal activity. Both times Yañez told Agent Gallman that Arditti would not be interested in the suggested activity (Government's Exhibit 33A at 57; Government's Exhibit 41A at 25, 38).

In March of 1989, some six months after the initial meeting, Gallman, for no apparent reason, asked Yañez to invite Arditti to lunch (App. 7). At this meeting, Arditti agreed to look at some paperwork for a real estate purchase for Agent Gallman. There were some general discussion concerning the fact that large amounts of cash raised suspicions.

This meeting ended with the only crucial dispute in the facts. Agent Gallman testified that he told Mr. Arditti at this meeting that his money was "coke money," and that Arditti did not raise any objections. App. 7. This part of the conversation was not taped and was not made part of a memorandum of the conversation prepared by the agent after the meeting. App. 7. Mr. Gabriel Yañez, who was present at the meeting, testified that no such statement was made (XIII R. 678). In any event, no illegal agreements were discussed or entered into at this meeting.

In May 1989, Gallman requested that Yañez arrange another meeting with Arditti. At this meeting, Gallman told Mr. Arditti that his money was "coke money." He also asked Arditti to set up a trust account so that he can put money in, and then wire it to Oklahoma, where he would invest it in oil. Arditti did not seem interested in helping Gallman, and Yañez suggested other ways of effectuating the money laundering. Agent Gallman

appeared to lose his temper with Arditti and Yañez and said in a raised voice:

> You don't understand. I'm going to say it one more time. An attorney *has* to do this. Not you. Not me. An attorney.

Government's Exhibit 69B at 69. Arditti left this meeting saying that he will look into the type of account suggested by Gallman.

Two and one half months after it was suggested by the government agent, Mr. Arditti opened the trust account, assisted by Mr. Yañez. To push Mr. Arditti to the point of agreeing to open the account, the Government hounded him mercilessly.

During the month of May, Gallman contacted Mr. Yañez seventeen times (XI R. 309-13). During this time he showed impatience, and complained about Mr. Arditti "dragging his feet." (XI R. 266-67). In a telephone conversation on May 9th, Gallman expressed to Yañez a great deal of aggravation over Arditti's nonaction. Yañez told Gallman that he thought Arditti was scared to open the escrow account. Gallman asked, "What the hell is he scared of?" Government's Exhibit 70D at 2. Gallman urged Yañez to put pressure on Arditti to complete the assignment. *Id.* at 3.

Mr. Yañez met with Gallman again on May 10, 1989 (XI R. 259; Government's Exhibit 71A). Gallman expressed irritation over the fact that Arditti has not opened the bank account yet (XI R. 310; Government's Exhibit 71A at 11, 19).

On May 15th, when Gallman asked about Arditti's progress, Yañez explained that he had contacted Arditti "every single day, and he finds an excuse." Government's Exhibit 73A at 1. Again Gallman tells Yañez to get Arditti "off the ball." *Id.* at 2.

Two days later, when Gallman called to check on the status of his account, Yañez suggested to Gallman that he employ another attorney to do the work for him. Government Exhibit 73A at 1. Yañez told Gallman that "I have the impression he [Arditti] doesn't want to do it." *Id.* Gallman, of course, did not follow Yañez' suggestion, but instead told him to "keep trying to get ahold of him." *Id.* Gallman contacted Yañez three times on May 30th to inquire about Arditti. Government's Exhibit 73C. Yañez explained that he had been to Arditti's office every day. *Id.* at 1.

By the end of May, Gallman acted increasingly irate at Arditti's procrastination. At a meeting on May 31, 1989, Gallman asked Yañez, "What's the damned deal with Vic?" (XI R. 315; Government's Exhibit 74A at 3). Yañez assured him that he would see that everything was taken care of. Gallman told Yañez to "get to Victor somehow or another. . . . " (XI R. 318).

During the month of June, Gallman contacted Yañez thirteen times (XI R. 345-46; App. 9 n.2). On June 6th, Gallman told Yañez: "Well damn, Gabriel. We need to get this thing goin' pal." Government's Exhibit 80B at 1. On June 16th, Gallman told Yañez: "Get, get it [the money] up to Oklahoma. They're about to wring my neck up there." (For not having the money there.) Government's

Exhibit 80G at 1. On June 29th, Gallman called Yañez. Gallman asked Yañez:

> What's the deal with Victor? Do I need to talk to him? Or, or does he want, I mean, just tell him to get the thing done.

Id. at 3.

For Yañez' part, he was trying to get Mr. Arditti to act. Between May 1, 1989, and July 14, 1989, Mr. Arditti's office was contacted by Yañez thirty-four times, and by Gallman three times[6] (XIII R. 708-14).

Finally, on July 14, 1989, Mr. Arditti, assisted by Yañez, opened the trust account at the bank. Thereafter, several transactions were made in and out of the account which make up the money laundering counts of the indictment.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. MR. ARDITTI'S CONVICTION MUST BE REVERSED BASED ON THIS COURT'S RECENT DECISION IN *JACOBSON V. UNITED STATES*, BECAUSE THE GOVERNMENT FAILED TO PRESENT ANY EVIDENCE OF HIS PREDISPOSITION TO COMMIT AN OFFENSE PRIOR TO THE CONTACT AND INDUCEMENTS OF THE GOVERNMENT AGENT.

On April 6, 1992, this Court issued an opinion that requires the reversal of Mr. Arditti's conviction. In

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[6] These are records of contacts with the office, not actual contacts with the person. In fact, Agent Gallman never spoke to Arditti between May 2nd and July 14th (XIII R. 547).

Jacobson v. United States, ___ U.S.___, 112 S.Ct. 1535 (1992), the Court held that there was entrapment as a matter of law where the Government did not have evidence that a defendant was predisposed to commit an offense prior to being approached by government agents. In the present case, there was no evidence of Mr. Arditti's predisposition prior to the undercover agent's involvement. Therefore, Mr. Arditti was entrapped as a matter of law, and his conviction must be reversed and rendered.

In *Jacobson*, the Court held:

> Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act *prior* to first being approached by Government agents.

(*Id.* at 1540, emphasis added (citing *United States v. Whoie*, 288 U.S.App.D.C 261, 263-264, 925 F.2d 1481, 1483-1484 (1991)).

In *Jacobson*, the defendant was charged with receiving child pornography through the mails. Jacobson had come to the Government's attention because he was on the mailing list of a business that sold pornography. There was evidence that he had purchased two magazines in the past that contained pictures of nude boys. At the time, the receipt of these two magazines did not violate the law, although three months later the child pornography statutes were amended. *Id.* at 1538.

Based on this information, the Government made Jacobson a target of an undercover investigation. In the

course of the undercover investigation, Jacobson answered two surveys indicating that he was interested in preteen sex. After several other undercover contacts through the mail, Jacobson finally ordered a magazine containing child pornography. He was arrested over two years after he became the target of the government sting operation. *Id.*

The Court reviewed the evidence of predisposition and determined that the Government had no evidence that Jacobson had ever intentionally possessed or been exposed to child pornography prior to the Government's undercover operation. The Postal Service had not checked his mail to see if he was receiving any such materials, and when Jacobson's house was searched nothing other than what the Government had sent was found at his house. The Court found that although Jacobson had *become* predisposed to commit the offense by the time he did so, "the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner since January 1985." *Id.* at 1541.

Applying the Court's analysis to the present facts, the same conclusion is inevitable – that no reasonable jury could have found that the Government carried its burden of proving that Mr. Arditti was predisposed to commit the offense prior to his contact with the Government agent.

The *Jacobson* Court divided the evidence of predisposition into two categories: evidence developed prior to the first undercover contact with Jacobson, and that developed during the course of the investigation. The

pre-investigation evidence was the receipt of the two magazines containing pictures of nude boys. In the present case, there was *no* pre-investigation evidence.

With respect to the evidence gathered during the investigation, the *Jacobson* Court found that:

> Petitioner's responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails.

Id. at 1542.

The Court is very clear in its decision that evidence of predisposition must be evidence of a predisposition to commit a definite illegal act. Behavior that is suspicious or that could even be illegal under certain circumstances will not suffice to carry the Government's burden.

In the present case, there was no evidence of predisposition on Mr. Arditti's part to commit an illegal act. Nor was there the degree of suspicious behavior that existed in *Jacobson*.

The lower court, in its opinion, sets forth what it considers to be incriminating evidence from the first meeting – that Arditti: (1) reassured the agent about the attorney/client privilege (2) said he had represented drug dealers in the past; (3) suggested that the agent have a "war chest" for legal fees; (4) mentioned financing a

house without using a bank; and (5) assured the agent that he would keep his fee payments confidential. App. 3-4. However, under *Jacobson*, none of Mr. Arditti's comments are any evidence of a predisposition to commit an offense, particularly in light of Mr. Arditti's stated refusal at that same meeting to engage in illegal conduct.

Consequently, Mr. Arditti's behavior, although suspicious through Government eyes, is no evidence of predisposition. The Government established a predisposition to perform legal services for a person with a questionable and possibly criminal background. But as the *Jacobson* Court found, "evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition." *Jacobson* at 1541.

The inference that Mr. Arditti was interested in committing a crime was certainly weaker than that in *Jacobson*, where the defendant initially indicated an interest in preteen sex. Not only did Mr. Arditti *not* indicate a willingness to actually break the law, neither did he indicate an interest in an activity which, if performed, would be illegal. At most, he indicated an interest in performing legal services, with legal funds, for the undercover agent.

Mr. Yañez twice, in October and November 1988, told the agent that Mr. Arditti would not be interested in his suggestions of illegal activity. Despite these discouragements, the Government decided some six months after the first meeting with Mr. Arditti, to contact him a second time. At this meeting Mr. Arditti discussed avoiding the suspicions that would be raised by making large cash transactions. App. 7. Again, Mr. Arditti does not indicate

any willingness to commit any illegal acts for the undercover agent. Under the Court's holding in *Jacobson*, Mr. Arditti's comments, especially since they were drawn out by the undercover agent, cannot be considered evidence of predisposition to commit an offense. Just as Jacobson's "ready response" to the solicitations was not evidence of predisposition, neither can Mr. Arditti's conversations with the undercover agent be considered evidence of predisposition to commit an offense. On the contrary, the agent used those conversations to attempt to create a predisposition in Mr. Arditti.

From the time that the agent first suggested an illegal act to Mr. Arditti (May 2nd) to the time Mr. Arditti performed that act (July 14th), Mr. Arditti was subjected to almost constant harassment. Most of those contacts were made by Yañez, acting at the direction of the undercover agent. However, the tape recorded conversations between Yañez and the agent indicate that Yañez clearly told the agent that he thought Mr. Arditti did not want to open the bank account for him. Rather than backing off, the undercover agent stepped up the pressure on Yañez, specifically instructing him to prod Mr. Arditti into action. When Yañez reported his failure to the agent, he is repeatedly instructed to keep trying to "get to Victor [Arditti]."

A. THE LOWER COURT'S OPINION IS IN CONFLICT WITH THE THIS COURT'S DECISION IN *JACOBSON*, BECAUSE WILLING, ACTIVE, AND EVEN EAGER PARTICIPATION, *AFTER EXTENSIVE INDUCEMENT*, IS NO LONGER DETERMINATIVE, OR EVEN PROBATIVE, OF PREDISPOSITION.

The United States Court of Appeals for the Fifth Circuit issued its opinion below prior to this Court's opinion in *Jacobson*, and refused rehearing after the issuance of *Jacobson*. The court relied on Fifth Circuit precedent that held that enthusiastic participation, regardless of prior Government contacts and inducements, was evidence of predisposition. App. 7 (citing *United States v. Johnson*, 872 F.2d 612, 621 (5th Cir. 1989)). Because this Court's opinion in *Jacobson* is contrary to this portion of the holding of *Johnson*, the result in the present case is contrary to the law of the Supreme Court. Accordingly, this Court should reverse Mr. Arditti's conviction, or in the alternative, vacate the judgment of the lower court with instructions for that court to rehear the case in light of this Court's holding in *Jacobson*.

In affirming Mr. Arditti's conviction against a challenge of entrapment as a matter of law, the lower court relied on what it described as Mr. Arditti's "eager, active" participation. App. 27. The district court, in denying his motion for judgment of acquittal, also relied on what could be viewed as Mr. Arditti's "willing and active" participation. App. 42-43. The Government did not offer, and thus neither court could find, any evidence of predisposition other than Mr. Arditti's ultimate participation in the offense. Because Mr. Arditti committed the offense

only after substantial pressure over an extended period of time, his level of participation or his degree of enthusiasm is irrelevant to the issue of predisposition under the Court's holding in *Jacobson*.

It is not disputed that Mr. Arditti did not commit an offense until he opened a bank account on July 14th, over nine months after his first meeting with the undercover agent, and after two and a half months of intense pressure from the agent. App. 8-9 n.2. As in *Jacobson*, there is no question that Mr. Arditti was induced to commit the offense. *Jacobson* at 1540 n.2. The issue is simply whether the Government carried its burden of proving a predisposition on the part of Mr. Arditti.

The Court in *Jacobson* discussed the pressure to which the defendant in that case was subjected. *Id.* at 1542. However, as the dissent pointed out, solicitations in the mail "could easily be ignored or thrown away." *Id.* at 1545. Not so with Agent Gallman's solicitations. The agent pushed himself on Mr. Arditti face to face. He cajoled Mr. Arditti with feigned friendliness, and when that didn't work, raised his voice and became aggressive to pressure him. The agent had Yañez personally contact Mr. Arditti at his law office nearly every day for over two months. Mr. Arditti could not simply ignore Agent Gallman.

The Court in *Jacobson* rejected the Government's position that "the evidence it developed during the course of the investigation was probative because it indicated petitioner's state of mind prior to the commencement of the Government's investigation." *Id.* at 1541 n.2. The Court emphasized prior law that the defendant's conduct, once

under the influence of the Government's contacts, is not probative of predisposition.

Under the holding in *Jacobson*, a person who jumps at the opportunity to commit an offense is not entrapped; not because his prompt response is evidence of predisposition, but rather because he was not *induced* to commit the offense. Where a person promptly avails himself of a criminal opportunity, it is unlikely his defense will even warrant an entrapment instruction. *Id.* at 1541. In *Jacobson*, the defendant was induced by the Government to commit the offense. *Jacobson* at 1540 n.2. Once inducement is shown, the Court held, the inquiry is whether the defendant was otherwise predisposed, independent of that inducement to commit the offense. *Id.* at 1540. Therefore, a defendant's conduct during the commission of the offense is relevant, but it is only relevant to the issue of inducement, not to the issue of predisposition.

There is no question that Mr. Arditti was induced by the Government to commit the offenses charged, and the Government has never argued otherwise. Thus, Mr. Arditti's burden having been met, the only question is whether the Government produced evidence of predisposition independent of the inducement to commit the offense. As discussed above, the Government offered no such evidence of predisposition.

The dissent in *Jacobson* contends that the Court is changing the law of entrapment. *Id.* at 1545. The majority, however, maintains that it is keeping with the precedent of *Sorrells v. United States*, 287 U.S. 435 (1932), *Sherman v. United States*, 356 U.S. 369 (1958), and *United States v. Russell*, 411 U.S. 423 (1973). *Id.* Whether *Jacobson* has

changed Supreme Court precedent or not, it clearly overturns the precedent of the Fifth Circuit Court of Appeals as set forth in *United States v. Johnson*, 872 F.2d 612 (5th Cir. 1989) and *United States v. Nations*, 764 F.2d 1073 (5th Cir. 1985). The "eager, active" participation in an offense is no longer sufficient evidence of predisposition to commit that offense, as it was under prior Fifth Circuit law. In any event that "eager, active" participation cannot be considered independent of the contact and inducements of the Government, as it was by the lower court.

CONCLUSION

The Court's decision in *Jacobson* requires a reversal of Mr. Arditti's conviction. The lower court's analysis of the evidence of predisposition was based on the Fifth Circuit law prior to *Jacobson*. Under the Court's holding in *Jacobson*, the Government did not carry its burden of presenting evidence of Mr. Arditti's predisposition because willing, active, and even eager participation, *after extensive inducement*, is no longer determinative, or even probative, of predisposition. Mr. Arditti is at least entitled to have his case reviewed under the correct standard of law as set forth in *Jacobson*.

For all of the foregoing reasons, Mr. Arditti's conviction should be reversed by this Court. In the alternative, the judgment of the court below should be vacated with

instructions for that court to rehear the case in light of this Court's holding in *Jacobson*.

Respectfully submitted,

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August 1992

UNITED STATES of America,
Plaintiff-Appellee,

v.

Victor ARDITTI, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Guillermo AVILA, Defendant-Appellant.

Nos. 90-8646, 90-8721.

United States Court of Appeals,
Fifth Circuit.

Feb. 27, 1992.

Securities broker and attorney were convicted in separate trials in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, J., of conspiracy to launder monetary instruments and of the substantive offense. Defendants appealed and appeals were consolidated. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) broker's conduct violated money laundering statute; (2) instructions were adequate in both trials; (3) defendants were not entrapped; (4) Government did not engage in outrageous conduct; and (5) district court did not abuse its discretion in quashing attorney's subpoena.

Affirmed.

Goldberg, Circuit Judge, filed specially concurring opinion.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, SMITH, and DUHÉ, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Guillermo Avila and Victor Arditti were convicted of conspiracy to launder monetary instruments and of the substantive offense. Avila argues that his conduct did not violate the federal monetary instrument laundering statute, that the jury instructions at his trial were inadequate, and that the government entrapped him and engaged in outrageous conduct in the court of its undercover operation. Arditti also challenges the jury instructions and charges entrapment and outrageous conduct, and he claims that in quashing a trial subpoena the district court deprived him of due process. We affirm.

I.

These appeals arise from an Internal Revenue Service ("IRS") undercover investigation of money-laundering. The defendants were tried separately, but their cases were consolidated on appeal. Because each defendant challenges the conduct of the IRS investigation, we present the facts of the two cases together. We then discuss Avila's argument that his conduct did not violate the statute, each defendant's challenges to the jury instructions, the issues of entrapment and outrageous government conduct as they apply to each, and the quashing of Arditti's subpoena.

II.

In 1988, IRS Special Agent Gary Gallman began investigating money laundering in El Paso, Texas, using

the assumed name of "Gary W. Adams" and portraying himself as a cocaine dealer. Gallman started with information that Gabriel Yanez, who owned a money exchange business, laundered money by handling it to disguise its source. Gallman's goal was to discover Yanez's methods and cohorts.

Gallman first contacted Yanez in May 1988, explaining that he wanted Yanez to help him move large amounts of cash offshore, then bring the money back into the United States in usable form, intimating that he and his associates were involved in illegal activity. Gallman and Yanez invented the name "Ricardo Guerra-Battle" and established a Mexican bank accounts in that name. Yanez twice funneled $100,000 cash through Mexico, arranged for the money to be wire-transferred to Gallman's bank in Dallas, then collected a fee from Gallman.

Yanez next arranged for Gallman to open a Cayman Islands account in the "Adams" and "Guerra" names, using a letter of introduction from an El Paso attorney to a Cayman Islands attorney. Gallman later asked Yanez to put him in touch with someone who could help him with business in El Paso. In September, Yanez introduced Gallman to Arditti, an El Paso criminal defense lawyer.

During the introductory meeting in September 1988, Gallman told Arditti that he must trust Arditti before he could reveal the nature of his business and explained that Yanez was helping him "get [his money] out and get it back" so that he could use it. Arditti reassured Gallman by mentioning the attorney-client privilege, his previous work with clients involved in drugs, and his distrustful nature.

Arditti told Gallman that since he was "into that kind of business," he should fund a war chest in preparation for the day he would need money to get out of jail on bond and hire a lawyer. Gallman explained that he couldn't spend any of the money "the way it is right now and that he had "to get it out and get it back." Although Arditti told Gallman that he could not advise him on how to launder any illegal funds, Arditti advised Gallman on structuring transactions to purchase real estate in El Paso without arousing suspicion and assured Gallman that the government would not discover any payments made by Gallman to Arditti.

In October, Yanez channeled another $100,000 of Gallman's cash to Gallman's Dallas account after tinkering with the Cayman Islands arrangements. In the meeting discussing the transfer, Gallman told Yanez directly that "he and his group were in the 'coke business' and his part was to handle the money they derived from the sales." Yanez and Gallman seemed to agree that they should follow Arditti's advice in investing in real estate and stocks by using Mexican cashier's checks, using the "Guerra" false name, and making purchases in the name of the British Virgin Islands corporation they had opened to facilitate the offshore Cayman Islands account. Gallman asked Yanez to recommend stock or brokerage houses that the corporation could use to invest in the stock market.

In November,[1] Yanez told Gallman about his friend Avila, a securities broker in San Antonio for the firm of

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[1] The district court instructed the jury that it could not consider any acts prior to November 18, 1988, the effective date

Prudential-Bache Securities ("Pru-Bache") who wouldn't insist on meeting Gallman "or anything like that." Yanez explained that he frequently referred business to Avila and that the two had a fee-sharing arrangement. When Gallman asked what Yanez had told Avila about him. Yanez said that he portrayed Gallman as a Mexican mining client seeking investments. When Gallman further questioned Yanez about Avila, Yanez said that "he has a lot of clients from Mexico in the same business you are, and he never asks questions." During this discussion, Gallman signed the brokerage forms provided by Yanez as "Guerra."

Yanez introduced Gallman and Avila in January 1989 at a hotel in San Antonio. Although Gallman used his undercover name, "Adams," he signed the client agreement and certificate of foreign status (W-8) as "Guerra." The W-8 eliminates brokerage house reporting requirements as to the accounts of foreign nationals and, thus, effectively would have prevented the government from knowing that Ricardo Guerra or Gary Adams was transacting business with Pru-Bache. Gallman told Avila that Gallman was both "Adams" and "Guerra" and that this was "untaxed money" from the Mexican mining operation. Additionally, according to the government, Avila knew that Gallman was not a Mexican citizen, yet told Gallman that he would "take whatever you tell me" when asked whether he felt comfortable about the Mexican mining investor story. Further, Avila told Gallman that

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of 18 U.S.C. § 1956(a)(3), relating to the charge of conspiracy to violate the statute.

because client "confidentiality is a must," he staggered client appointments and entertained at home.

The three arranged for investment funds to come from Gallman through Yanez to Avila. Avila repeated that under law and Pru-Bache policy he could not take cash and that investments of under $10,000 did not need to be reported to the government. In February, Gallman executed new, backdated documents to change the brokerage account to the name of the British Virgin Islands corporation at Avila's request. As with the first forms, Gallman signed the forms in blank, and Avila completed them.

A few days later in February, Gallman and Avila met again. Gallman plainly told Avila, "I am in the coke business. That's what I do. Now, you will not ever be involved in that part of it." Although Gallman offered Avila the opportunity to back away from the deals because of the source of the funds, Avila responded that Yanez had told him that, as long as Gallman provided the investment funds in check form, there was "[n]o problem as to where that money comes f[rom] or how it was made," because the corporation, not "Adams," was Avila's client. Avila asked Gallman whether he was a law enforcement officer, which Gallman denied.

Gallman purported to have recently collected $15,000, which, the government asserts, Avila admittedly understood were the proceeds from a cocaine deal. Avila, however, maintains that Gallman did not tell Avila that he wanted to violate the law or that he did not want to report the cash. Avila stresses that he told Gallman that he did not want to do anything illegal and that Gallman

confirmed that the corporation was "legal" and that Gallman was going to deposit "clean money."

After Avila repeated that he could not handle cash, he directed Gallman to obtain cashier's checks in the name of the corporation and told him how to do so. After Gallman obtained the checks, he met Avila outside Avila's office and gave him two cashier's checks totaling $15,000, payable to Pru-Bache in care of Avila. Avila deposited the funds in the corporation's account. In March, Gallman delivered to Avila a $40,000 cashier's check, which Avila also deposited.

At Gallman's request, Yanez invited Arditti to meet them for lunch in March 1989. Arditti discussed methods to avoid suspicion and the tracing of money, including not using cash. Gallman offered Arditti the chance to "walk away from the deal" if Arditti had a "problem with the money or what I do." According to Gallman's testimony, when Arditti responded that he had not asked what kind of business Gallman did, Gallman then clarified, "You understand this is coke money," to which Arditti replied, "You don't see me going anywhere, do you?" Arditti disputes Gallman's testimony as to this portion of their conversation and notes that the government failed to tape-record this exchange, nor did Gallman record it in his memorandum concerning the meeting.

In May, Gallman met with Yanez and Arditti. Gallman put aside the idea of real estate investments in El Paso and told Yanez and Arditti about an opportunity to invest $200,000 in an Oklahoma oil deal. Gallman revealed that "this money we're doing right now is part of a ten-kilo deal that . . . I'm getting paid off for

. . . now," and stressed protecting his identity in the oil deal. Arditti outlined a complex arrangement for preventing governmental access to Gallman's name through the royalty payment mechanism, perhaps setting up a foreign corporation or, as Gallman suggested, a trust in a foreign bank to receive and invest Gallman's money. Gallman repeated that "this is coke money" and wanted to know whether he could count on Arditti not to talk if "I end up . . . getting busted."

Arditti assured Gallman that he would not divulge anything but again warned Gallman against spending large lumps of cash. Arditti agreed to draft documents memorializing the "loan" of money from the corporation to Gallman, which would explain the source of Gallman's money, and to check on establishing an escrow account to receive Galllman's money and invest it in the Oklahoma deal.

The next week, Yanez told Gallman that the fake loan documents and the escrow account would be delayed because Arditti was being audited by the IRS. Arditti told Yanez he was worried about "being framed" by Gallman. When Yanez passed this information to Gallman and offered to contact another lawyer, Gallman insisted on using Arditti.

At the end of May, Gallman delivered $50,000, which Yanez funneled to Gallman's Dallas account. At this time, Yanez attributed Arditti's delay to procrastination but noted that Arditti was "convinced" about how to proceed with the bank in setting up the escrow account. Gallman repeatedly telephoned Yanez over the next few weeks because Gallman wanted Arditti to complete the deal.

Yanez continued to insist that Arditti would participate but wanted to take care in structuring the deal.[2]

The first infusion of funds to Oklahoma occurred through Yanez's own bank account at the end of June, not through the escrow account as envisioned by Gallman. Gallman asked for Yanez's help in getting the money to Oklahoma using the escrow account procedure. In mid-July, Gallman met in El Paso with Yanez and Arditti, who explained that they had agreed to the method used in the first transfer because the bank had set up some hurdles in establishing the escrow account. Departing from the escrow account idea, Arditti offered to set up a trust whose funds Arditti would manage, which would also conceal Gallman's identity. The three formulated an elaborate plan to invest money from the corporate brokerage account into the Oklahoma oil deal and completed the arrangements for the fraudulent loan.

With Yanez's participation, Arditti opened a bank account in the name "V.R. Arditti Trust Account Number 3" several days later. No trust documents were prepared for the account, and Arditti alone had signature authority and the code to validate wire transfers. When Arditti received a check from the corporate brokerage account

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[2] To buttress his claims of entrapment and outrageous government conduct, Arditti has pointed out several facts regarding the contacts between Yanez and Arditti after the May transaction, specifically: (1) Yanez told Gallman that he contacted Arditti or visited his office every day; (2) Arditti seemed so reluctant to do Gallman's work that Yanez suggested hiring another lawyer to complete Gallman's work; and (3) Gallman contacted Yanez three times on May 30 and 13 times in June to ask about Arditti.

for $50,000 on August 2, he deposited it in the trust account and told the bank to wire $49,000 to the oil deal bank account in Oklahoma.

In mid-August, Arditti gave Gallman a bill for his services. Gallman found the amount "pretty stout," so Arditti adjusted it downward but asked Gallman not to pay him in cash because that would appear suspicious. The three then devised a more efficient plan for future transactions, focusing on the need to shield Gallman by using the "Guerra" name and procuring the funds for deposit in the trust account at a Mexican bank in the form of a cashier's check.

As planned, Arditti received a $50,000 check the next day from a Mexican money exchanger and transferred the money to the oil deal account. On August 29, Arditti, following the same procedure, deposited another $50,000 in the trust account and wired it to Oklahoma.

III.

A grand jury charged Arditti with conspiring with Yanez and Avila in violation of 18 U.S.C. § 371 to (1) avoid filing currency transaction reports in violation of 31 U.S.C. § 5313(a); (2) avoid filing currency or monetary instrument reports in violation of *id.* § 5316; and (3) launder a monetary instrument in violation of 18 U.S.C. § 1956 (count one). Additionally, the indictment charged Arditti with violating section 1956(a)(3) (counts twelve, fifteen, and eighteen) and violating *id.* § 2 by aiding and abetting Yanez in violating section 1956(a)(3) (counts fourteen and sixteen). The jury convicted Arditti on all counts.

The indictment charged Avila with conspiring with Arditti and Yanez in violation of section 371 to commit the three offenses outlined above (count one). Additionally, the indictment charged Avila with violating section 1956(a)(3) (counts seven and eight). The district court granted Avila's motion to sever his case for trial.

The court granted Avila's motion for judgment of acquittal on the allegations in count one that Avila conspired to violate sections 5315(a) and 5316. The jury, however, convicted Avila on the remaining allegation in count one and on counts seven and eight.

IV.

Avila challenges his substantive and conspiracy convictions on the ground that his conduct did not violate a criminal statute. Section 1956(a)(3), entitled "Laundering of Monetary Instruments," makes it unlawful for a person, with the intent

> (A) to promote the carrying on of specified unlawful activity;
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> (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
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> (C) to avoid a transaction reporting requirement under State or Federal law,
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> [to] conduct[] or attempt[] to conduct a financial transaction involving property represented by a law enforcement officer to

> be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity. . . .

18 U.S.C. § 1956(a)(3) (West Supp.1988).[3] Section 1956(c)(4) defines "financial transaction" as

> (A) a transaction (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

Section 1956(c)(5) defines "monetary instruments" as follows:

> The term "monetary instruments" means (i) coin or currency . . . , travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery.

Avila urges reversal of his conviction under section 1956(a)(3) because the plain terms of the statute do not criminalize accepting cashier's checks in non-bearer form. Avila argues, as he did in a motion for acquittal, that a cashier's check is not a "bank check" under the relevant definition of "monetary instrument." Avila

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[3] All references herein are to the 1988 version of § 1956. Congress subsequently amended the statute, but altered only one of the provisions relevant here, § 1956(c)(5) (clarifying, not enacting substantive changes to, definition of "monetary instruments").

asserts that Congress did not intend to cover cashier's checks not in bearer form, as evidenced by a federal statute and multiple federal regulations that plainly acknowledge the distinction between a "bank check," i.e., a check drawn by a bank on its account in another bank, and a "cashier's check," i.e., a check drawn by a bank on itself and accepted upon issuance. *See e.g., Bruno v. Collective Fed. Sav. & Loan Ass'n,* 147 N.J.Super. 115, 370 A.2d 874, 877 n. 2 (1977).

The government agrees with Avila's characterization of the cashier's checks as non-bearer instruments and accepts Avila's distinctions between cashier's checks and bank checks. Pointing to the legislative history of section 1956, however, the government argues that Congress indeed intended the definition of the term "monetary instruments" to include cashier's checks. "Monetary instruments are a subset of the term 'property' as used in section (a), a term that is intended to be construed liberally to encompass any form of tangible or intangible assets." S.Rep. No. 433, 99th Cong., 2d Sess. 13 (1986).

Avila responds that the legislative history contextually refers to cashier's checks "in such form that title thereto passes upon delivery," not to all cashier's checks. *Id.* Moreover, Avila asserts that Congress's intent is irrelevant when a statute, like this one, is not capable of two rational readings. *Cf. McNally v. United States,* 483 U.S. 350, 360, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292 (1987) ("before one can be punished, it must be shown that his case is plainly within the statute") (citation omitted).

Despite the facts that Congress did not include cashier's checks in the statutory definition of monetary

instruments and that we must construe criminal statutes strictly, *see United States v. Daniel*, 813 F.2d 661, 663 (5th Cir. 1987), Avila's challenge to his substantive convictions must fail. Simply, the plain language of section 1956 does not require that the suspect have used a "monetary instrument" in his offense. A financial transaction for the purposes of the statute is "[1] a transaction involving the movement of funds by wire or other means *or* [2] involving . . . monetary instruments . . . *or* [3] involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree" (emphasis added). The substantive charges of his indictment, counts seven and eight, do not accuse Avila of laundering a "monetary instrument" as defined in section 1956(c)(5). Rather, count seven states that he conducted "a financial transaction involving property to wit: $15,000 in cashier's checks, represented by a law enforcement officer to be the proceeds of [specified] . . . unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(3)." Count eight is similar, except that it specifies $40,000 as the sum in question and does not mention cashier's checks.

The acts alleged in these counts plainly fall within the language of section 1956(c)(4)(A)(i): They were transactions "involving the movement of funds by wire or other means." The issue of whether cashier's checks are monetary instruments thus is irrelevant to the substantive counts; the checks unquestionably were "property" and "funds [moved] by wire or other means" under the statute.

Although we have not previously interpreted the money laundering statute in this way, the plain language

dictates such a holding, and this court has found that the statute encompasses a wide range of conduct. *See, e.g., United States v. Gallo,* 927 F.2d 815, 822 (5th Cir. 1991) (transporting money in the trunk of a car was a financial transaction in that it was a "movement of funds by wire or other means . . . which in any way or degree affects interstate of [sic] foreign commerce" (ellipses in original)).

We similarly uphold Avila's conspiracy conviction. The first count of the indictment charged that Yanez, Arditti, and Avila "willfully, knowingly and unlawfully conspired, combined, confederated and agreed together, and with each other, and with others to the Grand Jury unknown, . . . to launder a monetary instrument, in violation of Title 18, U.S.C. § 1956. Arditti does not raise the issue on appeal, but Avila appears to argue that this count of the indictment charges a crime that the government did not prove. Simply, Avila asserts that he did not conspire to launder a "monetary instrument" under the language of the statute. If there was conspiracy, Avila argues, it was to launder cashier's checks, which are not monetary instruments as statutorily defined.

As with the substantive counts, this court need not consider whether cashier's checks qualify as monetary instruments. Although cashier's checks were the means through which the conspirators were to launder the funds, the objective of the conspiracy was to launder the cash that "Adams" claimed to have obtained through his drug wholesaling activities. Cash, of course, is "coin or currency of the United States" and thus is a monetary instrument. Because Gallman represented to Avila that he wanted to launder cash, and Avila advised him how to

convert the cash into cashier's checks without having to present his identification, so the Pru-Bache could accept the money, we reject Avila's argument that no monetary instruments were involved.

V.

Avila further argues that his behavior was not illegal because the government agent did not represent to him that the funds he participated in laundering were the proceeds of criminal activity. Section 1956(a)(3), in establishing the basis for money laundering "sting" operations, requires that the government agent represent that the property involved in the transaction is the "proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity." The statute further defines the term "represented" as "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." 18 U.S.C. § 1956(a)(3).

Avila argues that "[s]trict construction . . . requires that the officer make an affirmative representation to the defendant," not merely a suggestion, or just enough information to create an inference. Nor can the government agent's perception of the "representation" substitute for satisfaction of the element. Because Gallman did not plainly tell Avila that the $15,000 and $40,000 cashier's checks were proceeds from cocaine sales, Avila urges reversal of the convictions.

We find Avila's arguments unconvincing. The record shows that "Adams" told Avila that he was in the cocaine

business and that the initial $15,000 was the proceeds of a collection. Because "Adams" represented his business as drug wholesaling, then never represented his relationship with Avila as one involving funds not derived from that illicit industry, the jury could have viewed the later $40,000 as ostensible drug-related funds, believe that Gallman portrays and Avila viewed them as such, and thus convict Avila of money laundering.

To hold that a government agent must recite the alleged illegal source of each set of property at the time he attempts to transfer it in a "sting" operation would make enforcement of the statute extremely and unnecessarily difficult; "legitimate criminals," whom undercover agents must imitate, undoubtedly would not make such recitations before each transaction. In this case, it is enough that sufficient evidence was presented that the jury could have found beyond a reasonable doubt that "Adams" represented, and Avila understood, that the funds they were laundering were the proceeds of the specified illegal activities.

VI.

Avila and Arditti challenge the district court's jury instructions at their respective trials. We find their argument to be without merit.

A district court possesses broad discretion in framing the instructions to the jury; we will not reverse unless the instructions taken as a whole do not "correctly reflect the issues and law." *United States v. Casto*, 889 F.2d 562, 566 (5th Cir. 1989), *cert. denied*, 493 U.S. 1092, 110 S.Ct. 1164, 107 L.Ed.2d 1067 (1990) (citation omitted). This court will

reverse for abuse of discretion a district court's refusal to issue a jury instruction only if the requested instruction "(1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that failure to give it seriously impairs the defendant's ability to effectively present a given defense." *United States v. Chambers*, 922 F.2d 228, 241 (5th Cir. 1991) (citation omitted).

The district court defined the offense of conspiracy (count one) in relevant part as follows, essentially tracking the *Fifth Circuit Pattern Jury Instructions* § 2.21 at 89 (West 1990):

> You must be convinced that the government has proved each of the following beyond a reasonable doubt . . . Second: That the defendant knew the purpose of the agreement and joined in it with the *intent* to further the illegal purpose. . . . So, if the defendant . . . knowingly and willfully joins in that unlawful plan on one occasion, that is sufficient to convict him for conspiracy.

The court defined the substantive offense under section 1956, charged in counts seven and eight, in relevant part as follows, tracking the language of the statute: "You must be convinced that the government has proved each of the following beyond a reasonable doubt . . . Second: That the defendant acted with the intent to promote . . . or conceal and disguise. . . . "

Avila requested that the jury be instructed that "willfully" means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to

disobey or disregard the law"; and that "[t]o establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law." On appeal Avila argues that the district court's refusal to issue the instruction he requested constituted reversible error, arguing that "willfulness" is a substantive element of a section 371 conspiracy and that "specific intent" is a substantive element of section 1956(a)(3) money laundering.

First, we find that the conspiracy instruction, as a whole, adequately addressed the burden the government had to bear. The requested instruction as to "willfully" was not necessary. The meaning of "willfully" varies depending upon the context. *See United States v. Bishop*, 412 U.S. 346, 356-61, 93 S.Ct. 2008, 2015-18, 36 L.Ed.2d 941 (1973). The Supreme Court has recognized that in common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional" and that in law the word generally refers to conduct that is not merely negligent. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 1681, 100 L.Ed.2d 115 (1988).

"Willfulness" appears in neither the section 371 definition of conspiracy nor the section 1956 monetary-instrument laundering statute, and, as defined in Avila's requested instruction, it is not an element of the conspiracy offense, which requires the state of mind necessary for the substantive crime. *See, e.g., United States v. Harrelson*, 754 F.2d 1153, 1172 (5th Cir.), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985). The definition of willfulness Avila requested is an exception to the traditional rule and is a statutory element of special treatment

of criminal tax offenses. *United States v. Cheek*, ___ U.S. ___, ___, 111 S.Ct. 604, 607, 112 L.Ed.2d 617 (1991).

The district court's conspiracy instruction required the jury to find (1) that there was an agreement between two or more persons; (2) that Avila joined the agreement knowing its purpose and with the intent to further the illegal purpose; and (3) that an overt act was committed. Further, the court instructed, "If the defendant knows about a plan, knows that it is an unlawful plan, and knowingly and willfully joins in the unlawful plan- . . . that is sufficient to convict him for conspiracy." These instructions cover the necessary elements of the conspiracy offense, including the requisite mental state. They thus differ from the charges we reject in *United States v. Burroughs*, 876 F.2d 366, 369 (5th Cir. 1989), which did not require that the defendant have joined the agreement "knowing its purpose and with the intent to further the illegal purpose," and *United States v. Kerley*, 643 F.2d 299, 302 (5th Cir. Unit B Apr. 1981), in which we reversed a criminal conviction for failing to instruct on the element of willfulness where such willfulness was actually a "critical element" of the offense.[4] We thus conclude that the requested instruction on willfulness was not substantially correct, and to the extent that it did accurately reflect the

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[4] *See also Fifth Circuit Pattern Jury Instructions* § 2.21, at 91 (West 1990) (proposed conspiracy instruction "adequately addresses the requirement of a specific intent to violate the law" if no "special state of mind," *e.g.*, premeditation, required by substantive offense); *id.* § 1.36 at 52 ("we have attempted to define clearly what state of mind is required, i.e., what the defendant must know and intend to be guilty of the particular crime charged").

law, it was included in the adequate instruction that the district court gave.

Second, we find that to the extent Avila's requested instruction of specific intent was correct, it too was included in the district court's instructions. The court told the members of the jury that they could not find Avila guilty unless they found that he conducted or attempted to conduct a financial transaction involving property represented by a law enforcement officer to be proceeds of the sale of illegal drugs and that he acted with the intent to promote the carrying on of the specified unlawful activity (meaning the drug dealing) or "to conceal and disguise the nature, location, source, ownership and control" of such property. The instruction parallels the wording of section 1956(a)(3) and includes all the elements of intent that Congress deemed necessary for the offense, as is apparent in the language of the statute. If Congress wanted to require any higher *mens rea* requirement, it would have enacted one. *See United States v. Baker,* 807 F.2d 427, 428 (5th Cir.1986).

VII.

Avila next argues that the district court erred in not instructing the jury as to his ignorance of the law. In *United States v. Davis,* 583 F.2d 190, 194 (5th Cir.1978), we held that "the trial court, when instructing that specific intent is required, may not instruct that ignorance of the law is no excuse, because ignorance of the law goes to the heart of the defendant's denial of specific intent."

In 1989 this court ordered a new trial for defendants who had been convicted on conspiring to commit tax

fraud under section 371 and of willfully aiding or assisting fraud in violation of 26 U.S.C. § 7206(2) because "the district court did not instruct the jury that they should, or could, consider the defendants' ignorance of the law." *United States v. Buford*, 889 F.2d 1406, 1409 (5th Cir.1989). Rather, the district court had instructed the jury that "the presumption is that every person knows what the law forbids." *Id.* The *Buford* court, however, interpreted the term "willfully" for purposes of the statute criminalizing preparation of fraudulent tax returns to mean a "voluntary intentional violation of a *known* legal duty" and viewed the absence of a corresponding "ignorance of the law" instruction as "inconsistent with the element of specific intent." *Id.* (citation omitted; emphasis added).

Avila asks us to apply *Buford* to the case at hand, but the reasoning in that case and the others Avila cites does not support such an extension. Avila urges us to hold that the district court erred because it failed to instruct the jury that it could consider Avila's ignorance of the law, despite the critical distinction that its instructions, and the applicable statute, did not require the government to prove that Avila intentionally violated a known legal duty, nor, for that matter, did the court issue an instruction that the jury should presume that Avila knew what the law was.

As we discussed above, such a concept of "willfulness" is not an element of the offenses with which Avila was charged. Because the instruction Avila requested is not a "substantially correct" statement of the law in this context, we affirm the refusal to include it.

Additionally, to the extent the requested instruction might accurately reflect the law, it was included in the instructions the district court issued. The conspiracy instruction told the jury that it could convict Avila only if it found that he joined the plan knowing that it was unlawful, and the substantive offense instructions provided that the defendant must have had represented to him that the funds were proceeds from specified unlawful activities and that he must have participated with the intent to further those activities or to conceal the funds. Lastly, we note that the entrapment instruction allowed the jury to consider whether the government agent impermissibly coaxed Avila into breaking the law, either through convincing him that his acts would be lawful or otherwise.

VIII.

Arditti challenges the district court's entrapment instructions. The instructions paralleled *Fifth Circuit Pattern Jury Instructions* § 1.28 at 40 (West 1990), and in relevant part provided that

> if the evidence in the case should leave you with a reasonable doubt whether the defendants had the previous intent or purpose to commit an offense of the character charged apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty. . . . The burden is on the government to prove beyond a reasonable doubt that the defendants were not entrapped.

Arditti requested that the district court include a sentence immediately after its instruction on the elements

of monetary instrument laundering to explain the link between the elements and entrapment: "Even if you find that the government has proved each element of this offense beyond a reasonable doubt, you must acquit the defendant if you find that he was entrapped." First, Arditti asserts that the charge as a whole confused the jury; he relies upon jurors' affidavits to show that they did not understand the entrapment instruction and, thus, could not consider the defense. Second, Arditti claims that because, after the defendant makes a prima facie showing of entrapment, the burden shifts to the government to prove that the defendant was predisposed to commit the offense, *see United States v. Johnson*, 872 F.2d 612, 620 (5th Cir.1989), predisposition becomes an element of the offense. Arditti argues that the government's burden becomes heavier when the court directly instructs the jury to consider entrapment as to each count of the indictment. *United States v. Allibhai*, 939 F.2d 244, 252 (5th Cir.1991), *petition for cert. denied*, ___ U.S. ___, 112 S.Ct. 967, ___ L.Ed.2d ___ (1991).

We find that the jury instruction on entrapment was adequate. We first note that the affidavits of juror confusion are not relevant for our decision, as whether a jury misunderstands its instructions is not to be re-examined after the verdict. *Robles v. Exxon Corp.*, 862 F.2d 1201, 1206 (5th Cir.) *cert. denied*, 490 U.S. 1051, 109 S.Ct. 1967, 104 L.Ed.2d 434 (1989). Second, Arditti may satisfy the first part of the three-part test outlined above, for the requested instruction was substantially correct, but Arditti cannot satisfy the second element, as the instruction was substantially given in the charge actually delivered to the jury.

Although the district court would not have erred in issuing the requested instructions, Arditti was not entitled to them. In *Allibhai* we did say that including an entrapment instruction after each count increases the burden the government must bear, but in context the statement merely meant that the defendants could not claim prejudice because the jury was instructed to consider the entrapment defense separately as to each count. 939 F.2d at 252. *Allibhai* does not mean that the defendant is entitled to such a placement of the instruction. The instruction the court gave the jury thus accurately reflected Arditti's rights and the government's burdens under the law.

IX.

Avila and Arditti moved to dismiss their respective indictments prior to trial and timely moved for judgment of acquittal based upon entrapment and outrageous conduct, motions that the district court denied. The entrapment defense involves examination of two factors: (1) government inducement; and (2) the defendant's predisposition, before contact with government agents, to commit the crime charged.

Entrapment as a matter of law is established only where a reasonable jury could not find that the government discharged its burden of proving the defendant was predisposed to commit the charged crime. *United States v. Nations*, 764 F.2d 1073, 1077, 1079 (5th Cir.1985). Once a defendant makes a prima facie showing of entrapment by

presenting "some evidence that government conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it," the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime and, thus, we not entrapped. *United States v. Johnson*, 872 F.2d 612, 621 (5th Cir.1989) (citing *Mathews v. United States*, 485 U.S. 58, 65-66, 108 S.Ct. 883, 888, 99 L.Ed.2d 54 (1988)). "[T]his Court must look to the evidence to determine whether, viewing reasonable inferences and credibility choices in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." *Id.* "On appeal from a conviction wherein the jury has rejected the entrapment defense, the standard of review is the same as that which applies to the sufficiency of the evidence." *Id.* (citing *United States v. Duvall*, 846 F.2d 966, 974 (5th Cir.1988)).

A.

Arditti argues that the government "offered *no* evidence of predisposition" *prior* to Arditti's involvement in the offense, disputing the district court's focus upon Arditti's "willing and active particpa[tion] in the scheme" as evidence of his predisposition toward the crime. Looking at the evidence in the light most favorable to the government, though, a reasonable jury could have found beyond a reasonable doubt that Arditti was predisposed to money laundering and thus was not entrapped.

As in *Nations*, 764 F.2d at 1077, there was "no overwhelming evidence of serious resistance" by Arditti.

According to the agent's testimony, after Gallman told Arditti that the source of the money involved in the proposed real estate investment was "coke money," but that if Arditti did not want to be involved in such a deal he could just walk away, Arditti replied, "You don't see me going anywhere." Although Arditti did not initially seek out the government agent, "an opportunity was provided and [Arditti] jumped in with both feet," helping Gallman formulate plans to launder the "drug" money and advising him on ways to avoid arousing governmental suspicion. *Johnson,* 872 F.2d at 621 (enthusiasm evidenced predisposition, even though government initiated illegal scheme). A jury could view Gallman's testimony and the tape recordings and video recordings of Arditti as proof that Arditti was an " 'eager, active participant' " in money laundering. *Duvall,* 846 F.2d at 974 (quoting *Nations,* 764 F.2d at 1077).

B.

Avila similarly argues that the government's evidence of predisposition falls short. Our response is the same: Despite Gallman's initiation of contact with Avila and Gallman's provision of the opportunity to launder drug funds, Yanez's testimony that he told Gallman that Avila "has a lot of clients from Mexico in the same business you are," Avila's complete lack of resistance, and Avila's energetic participation in the plan to launder "drug" money show that a reasonable jury could have found that he was predisposed to engage in money laundering. The entrapment defense in this case, "as in most cases, was not resolvable by the court as a matter of law." *Nations,* 764 F.2d at 1077.

C.

Both appellants also charge that their convictions should be overturned because the government investigation constituted outrageous conduct. We traced the evolution of the "outrageous conduct" defense in *United States v. Allibhai*, 939 F.2d 244, 248 (5th Cir.1991), *petition for cert. denied*, ___ U.S. ___, 112 S.Ct. 967, ___ L.Ed.2d ___ (1991). We recalled that a plurality of the Supreme Court, discussing the entrapment defense, noted in 1973 that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from . . . obtain[ing] a conviction." *United States v. Russell*, 411 U.S. 423, 431, 93 S.Ct. 1637, 1642, 36 L.Ed.2d 366 (1973). Although many have asserted the defense, "due process violation will be found only in the rarest and most outrageous circumstances." *United States v. Duvall*, 846 F.2d 966, 973 (5th Cir.1988) (citation omitted).

A defendant must prove not only "government overinvolvement in the charged crime," but also that he has not been an "active participant in the criminal activity which gave rise to his arrest." *Nations*, 764 F.2d at 1077. In finding no due process violation, the *Allibhai* panel observed "[a] litany of cases in which more extreme government behavior was upheld by courts." *Allibhai*, 939 F.2d at 248 (citations omitted); *see Duvall*, 846 F.2d at 975. A review of Arditti's and Avila's arguments on this issue leads to the same conclusion. *See Allibhai*, 939 F.2d at 249 (rejecting defendants' argument that the "government's conduct in approaching [defendant] with the money-laundering scheme was egregious enough to constitute a due process violation.").

D.

Arditti maintains that the government engaged in outrageous behavior by targeting him without a reasonable suspicion of predisposition to launder monetary instruments. We already have rejected a similar argument, however. This court applies the prohibition against governmental targeting of defendants in an investigation "only where the government employs a contingent fee informant and directs him to implicate specific individuals." *United States v. Nissen*, 928 F.2d 690, 693 (5th Cir.1991) (citation omitted). In any event, Arditti has produced no evidence that he was the target of the IRS investigation. He was brought in to the money laundering plot by his co-conspirator, Yanez.

Arditti also argues that the government's overinvolvement in the offense and the pressure its agents exerted on him constituted outrageous conduct. This argument also fails, as the quantum of governmental activity did not exceed levels previously condoned by this and other courts, *see, e.g., United States v. Tobias*, 662 F.2d 381 (5th Cir. Unit B Nov. 1981), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982), and Arditti actively participated in the criminal activity by formulating and carrying out investment plans for the "drug" money.[5]

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[5] *See Allibhai*, 939 F.2d at 248-249 (discussing cases); *accord United States v. Yater, 756 F.2d 1058, 1067 n. 12 (5th Cir.) cert. denied*, 474 U.S. 901, 106 S.Ct. 225, 88 L.Ed.2d 226 (1985) (discussing outrageousness of government's conduct in manufacturing drugs "without only meager assistance from the defendant's in *United States v. Twigg*, 588 F.2d 373 (3d Cir.1978)).

E.

Avila asserts that the government's conduct was outrageous because Gallman initiated all contacts and meetings with Avila and, further, misrepresented the legality of Avila's participation and the business of the corporation. Avila seemingly confuses the predisposition element of establishing the entrapment defense with the necessary proof of outrageous conduct. Avila actively participated in the money laundering, and he has far less of an argument for government overinvolvement than does Arditti.

F.

Arditti further invokes a Ninth Amendment argument that "a person's liberty, or right to be left alone, is violated when the government persists in attempts to engage the individual in criminal conduct after he has declined to become involved." He suggests that we adopt a bright-line rule that once a subject of investigation states that he does not wish to participate in illegal activity, government agents must leave him alone. *Cf. Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (once suspect requests a lawyer, police must stop interrogation and cannot resume it unless suspect initiates discussion and waives rights).

Nothing in the case law, the statutes, or the constitution requires such a rule, however. In *Allibhai* we rejected the claim that the right to be left alone forbids the government from targeting an individual in an investigation without a preexisting reasonable suspicion that the subject has been involved in wrong-doing. 939 F.2d at 249 & n. 3 (citing *Olmstead v. United States*, 277 U.S. 438, 478, 48

S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)). We then stated that where governmental excess ensnares a nonpredisposed individual, the entrapment defense should be sufficient to protect him. As discussed above, Arditti was not entrapped as a matter of law, and the government's behavior here does not rise to the level of outrageous conduct.

X.

Both before and at trial, Arditti subpoenaed IRS documents including those showing the "nature, goals and targets of its operation," asserting their relevance to his lack of predisposition for his entrapment and outrageous-conduct defenses. Arditti maintains that he needed the information to complete his defense and to summon all minimally reliable evidence in that regard, as guaranteed by the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment. Following the Government's statement that the internal memoranda and documents generated by an agency are privileged and thus not subject to discovery, the district court granted the government's motion to quash the trial subpoena because the subpoena constituted a discovery request, bordering on a fishing expedition. Arditti asserts that because the district court neither held a hearing on the motion to quash nor availed itself of the opportunity offered by the government to view the documents *in camera*, his rights were violated, and he requests a hearing wherein the government will be required to show that its privilege as to the documents should overcome his right to present evidence in his defense.

We review a grant of a motion to quash a subpoena for abuse of discretion. *Cf. United States v. Reeves*, 892 F.2d 1223, 1226 (5th Cir.1990) (upholding district court's refusal of pretrial request to inspect government files under Fed. R.Crim.P. 16(a)). We find that the district court did not abuse its discretion in quashing the subpoena.

Rule 16(a)(1) precludes "the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. . . . " Arditti essentially argues that the "subpoena at issue is a trial subpoena," covered by Fed.R.Crim.P. 17, which rule 16 does not govern because it only applies to "discovery of evidence *prior* to trial." Certainly Arditti could not gain discovery to the subpoenaed material under rule 16. Moreover, he does not establish that even the potentially longer reach of rule 17(c) stretches to those materials.

Our analysis of this issue begins with *Bowman Dairy Co. v. United States*, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951), which discusses the relationship between rule 16 and rule 17(c). There, the Court upheld an antitrust defendant's subpoena directing the government to produce documents, books, and objects it had obtained during the course of its investigation, even though such materials were not discoverable under rule 16. The district court held that the defendant might be able to obtain some such materials under rule 17(c), "as long as they are evidentiary." *Id.* at 219, 71 S.Ct. at 678. Although rule 17 extends to materials not subject to rule 16 discovery, it is not intended to provide an additional means of discovery. *Id.* at 220, 71 S.Ct. at 679. Every subpoena must be a

"good faith effort . . . to obtain evidence," and the district court may ensure that rule 17(c) is used only to that end through the court's power to quash or modify subpoenas. *Id.* at 219-20, 71 S.Ct. at 678-79.

The Court enunciated the burden a party must bear to gain access to materials under rule 17 in *United States v. Nixon*, 418 U.S. 683, 697-702, 94 S.Ct. 3090, 3102-05, 41 L.Ed.2d 1039 (1974). On appeal, Arditti must satisfy three requirements. He must show that (1) the subpoenaed document is relevant, (2) it is admissible, and (3) it has been requested with adequate specificity. *Id.* at 700, 94 S.Ct. at 3103. These specificity and relevance elements require more than the title of a document and conjecture as to its contents. In *Nixon*, the Watergate special prosecutor was permitted to obtain audio tapes that the president was trying to retain, because he had shown that "there was sufficient likelihood that each of the tapes contain[ed] conversations relevant to the offenses charged in the indictment." *Id.* He met this burden by offering sworn testimony of participants in the recorded conversations, or by giving reasons that permitted a rational inference of relevance, as well as by making a sufficient preliminary showing of admissibility.

We conclude that Arditti did not meet his burden under rule 17 and *Nixon*. In quashing the subpoena, the district court found that "I think it's not only discovery, but borders on a fishing expedition." This finding is supported by Arditti's argument before us: "The government's purpose, method and means of targeting and then pursuing Mr. Arditti are relevant to both the entrapment and the due process defenses. *To ascertain these particulars,* Arditti sought the documents that would set forth the

objectives of the undercover operation and the intended targets of that operation." (Emphasis added.)

Arditti thus has failed to establish with sufficient specificity the evidentiary nature of the requested materials. He has demonstrated why he wants to look into the material, but he has not set forth what the subpoena's materials contain, forcing the court to speculate as to the specific nature of their contents and its relevance. Accordingly, it appears that Arditti was attempting to use the subpoena to gain knowledge that he could not obtain under rule 16(a)(1), as much as to obtain evidence, i.e., that he was trying "to use the subpoena duces tecum as a discovery device, which it is not." *United States v. Nixon*, 777 F.2d 958, 969 (5th Cir.1985). In this context, the district court did not abuse its discretion in quashing the subpoena.

AFFIRMED.

GOLDBERG, Circuit Judge, specially concurring:

When one door closes, fortune will usually open another.[6]

The Rule 16 door closes, so a criminal defendant attempts to pry open, the Rule 17(c) portal. The district court, as keeper of the Rule 17(c) gate, hears the chanting of the "open sesame!"[7] incantation – "let me obtain the evidence" – but cannot unlock the entry, for the recitation

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[6] Fernando de Rojas, *La Celestina* act XV.

[7] *The Arabian Nights (A Thousand and One Nights) – The History of Ali Baba* (Galland trans.); *cf.* William Shakespeare, *Macbeth* act IV, sc. i ("Open, locks, Whoever knocks.").

fails to satisfy the demanding requirements of Rule 17(c). I concur in the majority opinion and write merely to elucidate the distinction that I see between Rules 16 and 17(c) and to explain the district court's duties, as I see them, in evaluating a Rule 17(c) subpoena *duces tecum*. *See* Majority Op. at 345-46.

The issue is whether Arditti satisfied the requirements of Federal Rule of Criminal Procedure 17(c), "which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings." *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 3102, 41 L.Ed.2d 1039 (1974). Rule 17(c) provides that "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein." Fed.R.Crim.P. 17(c).

Certainly a Rule 17(c) subpoena *duces tecum* is not a discovery device. *Nixon*, 94 S.Ct. at 3103 (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951)). Rule 17(c) is not intended "to provide an additional means of discovery beyond that provided in Rule 16." *United States v. Vanegas*, 112 F.R.D. 235, 238 (D.N.J.1986) (citations omitted); *see United States v. Nixon*, 777 F.2d 958, 968-69 (5th Cir.1985); *United States v. Marcello*, 423 F.2d 993, 1006 (5th Cir.), *cert. denied*, 398 U.S. 959, 90 S.Ct. 2172, 26 L.Ed.2d 543 (1970). This is because a "Rule 17(c) subpoena reaches only *evidentiary* materials" – not all *discoverable* materials. *United States v. Cuthbertson*, 651 F.2d 189, 195 (3rd Cir.) (citing *Bowman Dairy*, 71 S.Ct. at 679) (emphasis added), *cert. denied*, 454 U.S. 1056, 102 S.Ct. 604, 70 L.Ed.2d 594 (1981).

However, "[a]ny document or other materials, *admissible as evidence* . . . is subject to subpoena" under Rule 17(c). *Bowman Dairy,* 71 S.Ct. at 679. Rule 16, which severely restricts discovery in criminal cases, does not define the outer limits of materials available under a 17(c) subpoena, nor how wide the Rule 17(c) door will open. Indeed, documents and materials possessed by the government but not discoverable under Rule 16 can be reached by a Rule 17(c) subpoena – so long as the documents and materials are evidentiary. *Cf. id.* at 678.

The rule allows "[t]he court on motion made promptly [to] quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed.R.Crim.P. 17(c); *see also Nixon,* 94 S.Ct. at 3103. The district court thus wields "its power to rule on motions to quash or modify" to control the opening of the Rule 17(c) gate. *Bowman Dairy,* 71 S.Ct. at 678. Under the Rule 17(c) standard, then, the district court must determine whether the subpoena constitutes a "good-faith effort . . . to obtain evidence." *Id., cited in United States v. Noriega,* 764 F.Supp. 1480, 1493 (S.D.Fla. 1991). A party does not have to use all materials subpoenaed under 17(c) in evidence to satisfy this test. *Id.* Rule 17(c) merely requires that the moving party make a good faith effort to obtain evidence – instead of embarking on "a fishing expedition to see what might turn up." *Id.* 71 S.Ct. at 678, 679 (holding subpoena's "catch-all provision . . . not intended to produce evidentiary materials"); *see In re Martin Marietta Corp.,* 856 F.2d 619, 622 (4th Cir.1988), *cert. denied,* 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989).

To this end, a party demanding materials must unfasten three locks to free the 17(c) door. The rule requires not

only that the materials be relevant and admissible, but also that the demand must be sufficiently specific as to the documents requested. *Nixon,* 94 S.Ct. at 3103 (setting out the showing necessary to require production prior to trial under 17(c)).[8] We entrust these decisions to the discretion of the trial court "since the necessity for the subpoena most often turns upon a determination of factual issues." *Id.* 94 S.Ct. at 3104.

In the ordinary case, I would expect the district court to *review* the material *in camera* to determine whether the specificity, relevancy and evidentiary nature of the material warrants its production.[9] This case is the rare exception:

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[8] *See United States v. Komisaruk,* 885 F.2d 490, 495 (9th Cir.1989) ("A court is justified in quashing a subpoena duces tecum if production would be immaterial, unreasonable, oppressive and irrelevant."); *Martin Marietta,* 856 F.2d at 621 ("Enforcement of a Rule 17(c) subpoena is governed by the standards established in *United States v. Nixon.*"); *Cuthbertson,* 651 F.2d at 197 ("we emphasized that the material sought by the rule 17(c) subpoena must be evidentiary and relevant") (Sietz, C.J., concurring) (citations omitted); *Vanegas,* 112 F.R.D. at 239 ("relevant evidentiary materials subject to subpoena under Rule 17(c)").

[9] *See, e.g., Nixon,* 94 S.Ct. at 3103 (concluding that a "sufficient likelihood" existed that the content of the tapes were "relevant" and "admissible"); *United States v. Fowler,* 932 F.2d 306, 311-12 (4th Cir.1991) (affirming district court's denial of application for subpoenas because district court properly determined that information sought was irrelevant and had no evidentiary value); *Martin Marietta,* 856 F.2d at 622 (upholding district court's order compelling production of materials under 17(c) because district court properly determined that subpoena satisfied *Nixon* requirements after *in camera* production of documents, but remanding for *in camera* review as to claims of work-product privilege); *United States v. LaRouche Campaign,* 841 F.2d

the district court did not avail itself of the opportunity to review the material *in camera* before deciding to grant the motion to quash the subpoena. Rather, the court determined, without *in camera* review, that Arditti sought to travel the forbidden path – he wanted to embark on a "fishing expedition, to see what might turn up" on the other side of the Rule 17(c) gate. If Arditti *had* displayed the three *Nixon* keys – that is, made a threshold showing that the demand was specific and the material relevant admissible – then the district court would have abused its discretion by not peering through the keyhole and reviewing the material *in camera*. But Arditti did *not* brandish the keys labelled "specificity," "relevancy" and "admissibility." The court properly denied entry because fortune alone will not open the Rule 17(c) door.

1176, 1180 (1st Cir.1988) (affirming district court's order requiring production of documents for *in camera* review because threshold showing of "admissibility, relevancy, and specificity" meant the subpoena was not "unreasonable or oppressive" under 17(c)); *Nixon*, 777 F.2d at 969 (affirming district court's refusal to order production of government files under 17(c) because *in camera* inspection revealed that materials were not relevant); *Cuthbertson*, 651 F.2d at 195 (reversing order releasing materials because district court did not use its *in camera* review to "evaluat[e] the material against the evidentiary requirement of rule 17(c)"); *United States v. Poindexter*, 732 F.Supp. 135, 138, 141 (D.D.C.1990) (ordering disclosure of certain documents after briefing by the parties and *in camera* review to determine relevancy under 17(c)); *Vanegas*, 112 F.R.D. at 239 (granting motion to compel production of handwriting exemplars prior to trial under 17(c) based on determination of relevancy and admissibility).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8646

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

VICTOR R. ARDITTI,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING
(June 2, 1992)

Before GOLDBERG, SMITH and DUHÉ, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J Smith
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
	§	No.
v.	§	EP-89-CR-399-H
VICTOR R. ARDITTI	§	

ORDER REGARDING DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL
(Filed Sept. 20, 1990)

On this day came on to be considered the motion of Victor R. Arditti, one of the Defendants in the above-styled and numbered cause, for a post-verdict judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure. The jury returned a verdict of guilty as to the first, twelfth, fourteenth, fifteenth, sixteenth, and eighteenth counts of the indictment in this case. In the first count, Defendant Arditti was charged with conspiring with co-Defendants Gabriel I. Yanez and Guillermo Avila to fail to file currency transaction reports required by law and to launder monetary instruments. The other counts charged the substantive offense of "money laundering" in violation of 18 U.S.C. § 1956(a)(3). In his motion for a judgment of acquittal, Defendant Arditti contends that his rights to due process of law were violated by outrageous conduct on the part of the Government and that he was a victim of entrapment as a matter of law. The Defendant contends that the Court should reconsider its previous denial of his motion for acquittal and grant a judgment of acquittal after the jury verdict.

Language in some cases indicates that "outrageous government conduct" during a criminal investigation

may bar prosecution of a defendant require the dismissal of his indictment. **United States v. Nations,** 764 F.2d 1073, 1076 (5th Cir. 1985); **United States v. Yater,** 756 F.2d 1058, 1064-66 (5th Cir. 1985). Only the "rarest and most outrageous circumstances" will lead the court to find the kind of due process violation that will justify dismissal of the case against the defendant. **United States v. Nations, supra** at 1077; **United States v. Yater, supra** at 1065-66. Furthermore, this defense requires proof of government overinvolvement in the crime charged as well as proof of the defendant's mere passive connection to criminal activity orchestrated and implemented by the government. **United States v. Nations, supra; United States v. Yater, surpa.**

In the instant case, Defendant Arditti complains that the Government chose him as a target of its investigation without possessing sufficient information to indicate that he was predisposed to commit the kind of offense being investigated. This argument is foreclosed by the decision of the Fifth Circuit in **United States v. Duvall,** 846 F.2d 966 (5th Cir. 1988). In its opinion, the Court stated the following at page 974:

> Here, the defendants complain merely that King targeted them without sufficient evidence that they were predisposed to commit the crimes being investigated and that he was a persistent and persuasive salesman. We have prohibited the government from targeting defendants in an investigation only where the government employs a contingent fee informant and directs him to implicate specific individuals.

In the instant case, Defendant Arditti was not "targeted" by any confidential informant. On the contrary, Gabriel Yanez, one of his co-Defendants, brought Arditti into the transaction and introduced him to the Government's undercover agent. Therefore, the "outrageous government conduct" defense, as it has been defined and limited by the Fifth Circuit, cannot apply to this Defendant's case.

In the alternative, Defendant Arditti contends that he was a victim of entrapment as a matter of law. If a defendant properly raises the defense of entrapment, as Arditti did in the trial of this case, the government has the burden of proving beyond a reasonable doubt that he was predisposed to commit the crime charged in the indictment. **United States v. Duvall, supra** at 974; **United States v. Nations, supra** at 1077; **United States v. Henry,** 749 F.2d 203, 207 n. 5 (5th Cir. 1984) (en banc). In reviewing the sufficiency of the evidence concerning the defendant's predisposition, the court must view the evidence in the light most favorable to the government. **United States v. Duvall, supra** at 974; **United States v. Rubio,** 834 F.2d 442, 451 (5th Cir. 1987). The court is not authorized to find entrapment as a matter of law unless it concludes that no reasonable jury could have found that the defendant was predisposed to commit the offense. **United States v. Duvall, supra; United States v. Rubio, supra** at 450. In the instant case, a reasonable jury could have found from all the evidence that the Defendant was predisposed to commit the offenses charged. The jury could have viewed the testimony of the Government's undercover agent and especially the videotape recordings of Arditti's conversations with the undercover agent as

showing him to be a willing and active participant in the scheme. **United States v. Duvall, supra; United States v. Nations, supra** at 1077.

It is therefore ORDERED that the motion of Defendant Victor R. Arditti for a judgment of acquittal in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 19th day of September, 1990.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
UNITED STATES
DISTRICT JUDGE

(2)

No. 92-382

FILED
NOV 3 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

VICTOR ARDITTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTION PRESENTED

Whether petitioner was entrapped as a matter of law as a result of the undercover investigation that led to his prosecution for conspiracy and money laundering.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-382

VICTOR ARDITTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-38, is reported at 955 F.2d 331. The order of the district court, Pet. App. 40-43, denying petitioner's post-verdict motion for a judgment of acquittal is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on June 2, 1992. Pet. App. 39. The petition for a writ of certiorari was filed on August 31, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to avoid filing currency transaction reports and to launder a monetary instrument, in violation of 18 U.S.C. 371, and five counts of money laundering, in violation of 18 U.S.C. 1956(a)(3). He was sentenced to a prison term of 18 months, to be followed by three years' supervised release. He was also ordered to pay a fine of $10,000. The court of appeals affirmed. Pet. App. 1-38.

1. In 1988, IRS Agent Gary Gallman began an undercover investigation of money laundering in El Paso, Texas. Gallman had information that Gabriel Yanez, who owned a money exchange business, was laundering money. Using the name "Gary W. Adams," Gallman posed as a cocaine dealer and contacted Yanez. Gallman intimated to Yanez that Gallman and his associates were involved in illegal activity. Gallman told Yanez that he wanted Yanez's help in moving large amounts of cash "off-shore" and in returning it to the United States in usable form. Yanez arranged for Gallman to open a bank account in Mexico under the name "Ricardo Guerra-Battle." Yanez twice funneled $100,000 in cash through Mexico, arranged for the money to be wire-transferred to Gallman's bank account in Dallas, and then collected a fee from Gallman. Pet App. 2-3; Gov't C.A. Br. 3-8.

Yanez next tried to help Gallman open a bank account in the Cayman Islands by using a letter of introduction from a commercial lawyer in El Paso to a Cayman Islands attorney. When Yanez learned that

the account could not be opened in the name of an individual, he suggested that Gallman form a corporation for that purpose in the British Virgin Islands. Gallman agreed that Yanez should have the necessary documents prepared. Gallman later asked Yanez to recommend an attorney who could handle their financial transactions. Yanez mentioned that petitioner, an El Paso criminal defense lawyer, had handled several cases involving deposits. Pet. App. 3; Gov't C.A. Br. 9-10.

On September 21, 1988, Yanez introduced Gallman to petitioner.[1] Yanez said that he had told petitioner about the two prior laundering transactions. When petitioner asked Gallman the nature of his business, Gallman replied that he would have to trust petitioner before revealing that information. Gallman identified several drug dealers with whom he claimed to have been involved, and he explained that Yanez was helping him "get [his money] out and get it back" so that he could use it. Petitioner reassured Gallman by mentioning the attorney-client privilege, his previous work with clients involved in drugs, and his distrustful nature. Petitioner also told Gallman that because Gallman was "into that kind of business," he should fund a war chest in preparation for the day that he would need money to get out of jail on bond and hire a lawyer. Gallman replied that he could not spend any of the money "the way it is right now" and that he had "to get it out and get it back." When petitioner told Gallman that he could not advise him on how to

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[1] All meetings between petitioner and Agent Gallman were videotaped. Gov't C.A. Br. 39.

launder illegal funds, Gallman responded that Yanez was doing that for him and that one of the reasons he wanted to go off-shore was to keep people from asking questions. Gallman said that he wanted to spend $200,000 to $300,000 in cash on houses "here and there," and petitioner advised him on structuring real estate transactions so as to avoid arousing suspicion. In particular, petitioner recommended that Gallman avoid cash purchases and bypass the banking system with owner financing. Petitioner added that if Gallman used his services, the government would not discover Gallman's payments to him. Pet. App. 3-4; Gov't C.A. Br. 10-14.

In petitioner's presence, Yanez told Gallman that the corporation they had previously discussed had been set up in the British West Indies. Gallman then signed the documents authorizing the opening of the Cayman Islands bank account both in his undercover name and in the name "Ricardo Guerra." Gallman said that he would return in October. Pet. App. 14; Gov't C.A. Br. 14.

In October, Yanez channeled another $100,000 of Gallman's cash to Gallman's Dallas account. At a meeting about the transfer, Gallman told Yanez that he and his group were "in the 'coke business,' " that he was responsible for handling the money derived from the sales, and that he had several million dollars with which he wanted to buy houses and invest in the stock market. The two agreed to follow petitioner's advice about avoiding cash purchases of property; they decided to use Mexican cashier's checks instead, and to make all purchases in the corporate name to protect Gallman's identity. With respect to the

lawyers helping them, Yanez said that he hesitated to let the commercial lawyer know about the source of Gallman's money because that lawyer was "straight." Yanez said that petitioner had agreed to assist Gallman but would not take a retainer from him because of the risk that the government would confiscate Gallman's money. Yanez reiterated that petitioner wanted Gallman to maintain a war chest in Mexico for contingencies. Pet. App. 4; Gov't C.A. Br. 14-16.

On March 30, 1989, at Gallman's request, Yanez invited petitioner to meet them for lunch. The three discussed methods of keeping money from being traced. Noting that large depositors are required to furnish information about themselves, petitioner said that smaller deposits are safest. Petitioner suggested that Gallman transact his business through checks or wire transfers, and that he make the standard down-payment on anything he bought and pay the rest in installments. Pet. App. 7; Gov't C.A. Br. 18-20.

Gallman offered petitioner the chance to "walk away from the deal" if petitioner had a "problem with the money or with what I do." When petitioner responded that he had not asked what kind of business Gallman was involved in, Gallman said, "You understand this is coke money," to which petitioner replied, "You don't see me going anywhere, do you?" At the end of the meeting, petitioner confirmed that he had "no qualms, no qualms at all." Pet. App. 7; Gov't C.A. Br. 20.

On May 2, Gallman again met with petitioner and Yanez. Gallman mentioned that he had an opportunity

to invest $200,000 in an Oklahoma oil deal. Gallman revealed that "this money we're doing right now is part of a ten-kilo deal that * * * I'm getting paid off for * * * now," and stressed the need to conceal his involvement in the oil deal. Petitioner outlined a complex arrangement for preventing the government from learning Gallman's identity, including the use of a foreign corporation as the investor, the creation of a group of corporations through which the money could be transferred, and the setting up of a trust in a foreign bank to receive and invest the money. Pet. App. 7-8; Gov't C.A. Br. 21-22.

Gallman repeated that "this is coke money" and wanted to know whether he could count on petitioner not to talk if "I end up * * * getting busted." Petitioner assured Gallman that he would not divulge anything but again warned Gallman against spending large amounts of cash. Petitioner agreed to draft documents memorializing a "loan" of money from the foreign corporation to Gallman, which would explain the source of Gallman's money, and to check on establishing an escrow account to receive Gallman's money and invest it in the Oklahoma deal. Pet. App. 8; Gov't C.A. Br. 23.

The next week, Yanez told Gallman that the preparation of the fake loan documents and the opening of the escrow account would be delayed because petitioner was being audited by the IRS. Yanez added that petitioner was having trouble opening the escrow account because the bank insisted on knowing the identities of the parties to the transaction and the purpose of the account. Yanez reported that petitioner had expressed concern about

"being framed" by Gallman. When Yanez offered to ask the commercial lawyer to handle the matter, Gallman said that he was uncomfortable with that and wanted to use petitioner because "he knows the score." Pet. App. 8; Gov't C.A. Br. 25-26.

At the end of May, Gallman delivered $50,000 to Yanez, who in turn funneled it to Gallman's Dallas account. Yanez attributed petitioner's delay in implementing their arrangements to procrastination and to the press of other business. Yanez added, however, that petitioner had told him just a few days earlier that he had researched the escrow issue and was "convinced" about how to proceed with the bank in setting up the account. Gallman telephoned Yanez a number of times over the next few weeks, asking him to have petitioner complete the deal. Yanez insisted that petitioner had no problem with participating in the venture but explained that petitioner wanted to be careful in structuring the transaction. Pet. App. 8-9; Gov't C.A. Br. 26-28.

The first infusion of funds to Oklahoma occurred through Yanez's own bank account at the end of June, not through the escrow account as originally planned. At a meeting in mid-July, petitioner explained to Gallman that he and Yanez had chosen that method of transfer because of the complications involved in establishing the escrow account. Petitioner offered to set up a trust for Gallman and manage its funds, an arrangement that would allow him to move money in and out of the account on Gallman's instructions while preserving Gallman's anonymity. The three formulated an elaborate plan to funnel money from the foreign corporate account through Mexico and into

the trust account without having to report the transactions. They then completed the arrangements for the fraudulent loan from "Guerra" to Gallman. Pet. App. 9; Gov't C.A. Br. 28-30.

Several days later, petitioner opened an account in the name "V.R. Arditti Trust Account Number 3." No trust documents were prepared for the account, and petitioner alone had signature authority and the code to validate wire transfers. When petitioner received a check for $50,000 from the corporate account on August 2, he deposited it into the trust account and instructed the bank to wire $49,000 to the oil deal bank account in Oklahoma. Pet. App. 9-10; Gov't C.A. Br. 32.

On August 8, petitioner presented Gallman with a $5,000 bill for his services and said that in the future he would charge a fee of three percent of the money he moved into and out of the trust account plus legal fees. When Gallman protested the size of the transfer fee, petitioner reduced it to two percent. Petitioner asked Gallman not to pay him in cash in order to avoid arousing suspicion. The three then devised a more efficient plan for future laundering transactions, focusing on the need to shield Gallman's identity by using the name "Guerra" and by procuring the funds for deposit in the trust account at a Mexican bank in the form of a cashier's check. Pet. App. 10; Gov't C.A. Br. 32-35.

As planned, petitioner received a check for $50,000 the next day from a Mexican money exchanger, deposited it into the trust account, and transferred the money to the oil deal account five days later. On August 29, petitioner followed the same procedure

with another $50,000. Pet. App. 10; Gov't C.A. Br. 35-36. The undercover operation was subsequently terminated, and petitioner and Yanez were indicted.

2. Petitioner raised an entrapment defense at trial but was convicted. After trial, he moved for a post-verdict judgment of acquittal on the ground that he had been entrapped as a matter of law. The district court denied the motion. Pet. App. 40-43. The court observed, first, that "[i]f a defendant properly raises the defense of entrapment, as [petitioner] did in this case, the government has the burden of proving beyond a reasonable doubt that he was predisposed to commit the crime charged." *Id.* at 42. The district court noted that it was obliged to assess the evidence of predisposition "in the light most favorable to the government," and that it was "not authorized to find entrapment as a matter of law unless it conclude[d] that no reasonable jury could have found that the defendant was predisposed to commit the offense." *Ibid.*

Applying these principles to the facts of this case, the district court concluded that

> a reasonable jury could have found from all the evidence that [petitioner] was predisposed to commit the offenses charged. The jury could have viewed the testimony of the Government's undercover agent and especially the videotape recordings of [petitioner's] conversations with the undercover agent as showing him to be a willing and active participant in the scheme.

Pet. App. 42-43.

3. The court of appeals affirmed. Pet. App. 1-38. The court noted that the entrapment defense involves

"two factors: (1) government inducement; and (2) the defendant's predisposition, before contact with government agents, to commit the crime charged." The court then explained that entrapment is established as a matter of law "only where a reasonable jury could not find that the government discharged its burden of proving the defendant was predisposed to commit the charged crime." *Id.* at 25. With respect to burdens of proof, the court stated:

> Once a defendant makes a prima facie showing of entrapment by presenting "some evidence that government conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it," the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime and, thus, [was] not entrapped.

Id. at 25-26. The court acknowledged that on appeal from a conviction in which the jury has rejected the entrapment defense, the standard of review is whether, "viewing reasonable inferences and credibility choices in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." *Id.* at 26.

Under these principles, the court held, petitioner's post-verdict motion for a judgment of acquittal was properly denied. The court noted that "there was no overwhelming evidence of serious resistance by [petitioner]," Pet. App. 26 (internal quotation marks omitted), and that "[a] jury could view [Agent] Gallman's testimony and the tape recordings and

video recordings of [petitioner] as proof that [petitioner] was an eager, active participant in money laundering," *id*. at 27 (internal quotation marks omitted). The court pointed out that after Agent Gallman told petitioner that the money for the proposed real estate investment was "coke money" and that petitioner could just walk away if he did not want to be involved in such a deal, petitioner replied, "You don't see me going anywhere." *Ibid.* The court added that although petitioner did not initially seek out the government agent, petitioner responded to the opportunity that the agent offered him by "jump[ing] in with both feet, helping Gallman formulate plans to launder the 'drug' money and advising him on ways to avoid arousing governmental suspicion." *Ibid.* (internal quotation marks omitted); see also *id.* at 29. Accordingly, the court concluded that "a reasonable jury could have found beyond a reasonable doubt that [petitioner] was predisposed to money laundering and thus was not entrapped." *Id.* at 26.[2]

ARGUMENT

Petitioner contends (Pet. 12-21) that under the concept of predisposition articulated in *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992), he was entrapped as a matter of law. Petitioner is incorrect. The *Jacobson* Court's understanding of predisposition

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[2] The court of appeals also rejected petitioner's claims that the government's investigation of him was outrageous and violative of due process, Pet. App. 28-31, that the district court's instructions on entrapment were inadequate, *id.* at 23-25, and that the district court improperly quashed his subpoena for IRS documents, *id.* at 31-34. Petitioner does not renew those claims in this Court.

does not differ from that of the court of appeals. Accordingly, review by this Court is not warranted.

Jacobson involved a sting operation in which the government repeatedly contacted the defendant over a two-and-a-half year period through various fictitious organizations and a bogus pen pal before the defendant accepted an invitation to purchase child pornography through the mail. Relying on the well-settled proposition that "[g]overnment agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute," 112 S. Ct. at 1540 (citing *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932)), the Court concluded that the defendant had been entrapped as a matter of law into ordering the prohibited material. The Court reasoned that the government's prior contacts with the defendant "not only excited [his] interest in sexually explicit materials banned by law but also exerted substantial pressure on [him] to obtain and read such material as part of a fight against censorship and the infringement of individual rights." *Id.* at 1542. In those circumstances, the Court held, "[r]ational jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition [to commit the offense charged] prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [him]." *Id.* at 1543.

Like the *Jacobson* Court, the court of appeals in this case focused on whether petitioner was predisposed to commit the crimes charged independent of the government's conduct. See Pet. App. 25 (focus of

entrapment defense is "defendant's predisposition, before contact with government agents, to commit the crime charged.").[3] After viewing the evidence in the light most favorable to the government, as it was required to do, see *United States* v. *Collins*, 957 F.2d 72, 77 (2d Cir.), cert. denied, 112 S. Ct. 2285 (1992); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990), the court specifically rejected petitioner's claim that "the government offered *no* evidence of predisposition *prior* to [petitioner's] involvement in the offense." Pet. App. 26 (internal quotation marks omitted). The court of appeals' conclusion finds ample support in the record. As the court correctly observed, petitioner "was brought into the money laundering plot by his co-conspirator, Yanez," not by Agent Gallman. *Id.* at 29. The jury was permitted to infer that Yanez, who indisputably was engaged in money laundering activities, sponsored petitioner's participation in Gallman's money laundering scheme because he knew from experience, or otherwise had reason to expect, that petitioner would be a willing and reliable ally in

---

[3] The cases on which the court of appeals principally relied, Pet. App. 26-27, also applied this standard. See *United States* v. *Johnson*, 872 F.2d 612, 620-621 (5th Cir. 1989) (in determining whether defendant was entrapped as a matter of law, "[the] relevant focus is on [his] predisposition to commit the crime prior to any contact with the Government agents"); *United States* v. *Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985) (court must focus on "the predisposition of the defendant, before contact with government agents, to commit the crime charged"). There is thus no merit to petitioner's contention, Pet. 21, that *Jacobson* "clearly overturns" those cases.

the illegal enterprise. Once Yanez tendered petitioner as a potential co-conspirator, Gallman merely provided petitioner with an opportunity to commit the crime, whereupon—as the court of appeals noted—petitioner "jumped in with both feet." *Id.* at 27.

Petitioner "actively participated in the criminal activity by formulating and carrying out investment plans" for Gallman, Pet. App. 29, even though Gallman had warned him that the money was "coke money" and had assured him that he was free to walk away from the deal if he was uncomfortable with it, *id.* at 27. The court thus properly determined that "a reasonable jury could have found beyond a reasonable doubt that [petitioner] was predisposed to money laundering and thus was not entrapped." *Id.* at 26.[4]

In *Jacobson*, the Court reaffirmed the longstanding principle that a prosecution will not be defeated when government agents "merely afford opportunities or facilities for the commission of the offense," and that

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[4] The jury instructions ensured that petitioner could be convicted only on the basis of predisposition that existed independent of the government's acts. As the court of appeals noted, the instructions paralleled *Fifth Circuit Pattern Jury Instructions* § 1.28, at 40 (West 1990) and provided in pertinent part that:

> [I]f the evidence in the case should leave you with a reasonable doubt whether the defendant[] had the previous intent or purpose to commit an offense of the character charged apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty. * * * The burden is on the government to prove beyond a reasonable doubt that the defendant[] [was] not entrapped.

Pet. App. 23; Gov't C.A. Br. 46.

"[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." 112 S. Ct. at 1540. The Court explained:

> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition. See *United States* v. *Sherman*, 200 F.2d 880, 882 (CA2 1952). Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner * * * had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. *Mathews* v. *United States*, 485 U.S. 58, 66 * * * (1988).

112 S. Ct. at 1541. In this case, Agent Gallman simply offered petitioner an opportunity to participate in a criminal venture for which petitioner's co-conspirator Yanez had recommended him. Petitioner's ready acceptance of that opportunity in exchange for legal fees and, later, for a percentage of the money laundered through the trust that he set up in his own name for that purpose demonstrate that he was an "unwary criminal," not an "unwary innocent," see *id.* at 1537 (quoting *Sherman* v. *United States*, 356 U.S.

369, 372 (1958)), and that he was therefore not entrapped as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-382

In The

Supreme Court of the United States

October Term, 1992

VICTOR ARDITTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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For The Fifth Circuit

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

INTRODUCTION

In urging this Court to deny Petitioner's writ, the Government sets forth a substantial misstatement of the record in this case. Counsel, apparently rather than having reviewed the record, has repeated the many blatant misstatements of facts that appeared in the Government's brief in the lower court. There is no question of misconstruing the evidence: with the exception of a portion of one meeting, every meeting between the agent and Petitioner was taped. The Government has simply misstated the evidence that appears on the tapes that it introduced at trial.

Mr. Arditti believes that this Court's decision in *Jacobson v. United States*, 112 S.Ct. 1535 (1992), has an impact on this case, such that had the lower court had the benefit of that decision, it would have reversed Mr. Arditti's conviction. Because the evidence is so important to the Court's decision whether to grant the writ, Petitioner has corrected the substantial misstatements of fact in the Government's brief.

The Government's legal arguments are faulty as well. The Government argues that the holding in *Jacobson* would not have altered the decision of the court below because the law already required evidence of predisposition prior to contact by Government agents. The Government does not, and cannot, address Petitioner's argument that *Jacobson* changed the law with respect to what constitutes evidence of predisposition. Commission of a crime, where there has been inducement, will no longer in and of itself be evidence of predisposition as it was in the Fifth Circuit prior to *Jacobson*. Instead of countering Petitioner's argument, the Government asserts for the first time in this Court its argument that Mr. Arditti was not induced to commit this offense.

MISSTATEMENTS IN THE GOVERNMENT'S STATEMENT OF FACTS

1. The Government, in explaining Mr. Arditti's introduction to the undercover agent, states that: "Gallman later asked Yañez to recommend an attorney who could handle their financial transactions." Brf. Opp. at 3. While this fits with the Government's theory that Mr.

Arditti was recommended for participation in this offense, the record reveals otherwise.

The transcript of the conversation in question reflects the following:

> Adams: Gabriel, I may have like . . . I may have some, the business that I want to do in El Paso, and if I had any problem with it, is there somebody there, or would this guy[1] be somebody that, that if I had problems I can, get ahold of him through you or just . . .
>
> Yañez: Like a, lawyer or . . .
>
> Adams: Un-huh.
>
> Yañez: Oh yeah.
>
> Adams: Well this guy[2] doesn't do any criminal work.

Government's Exhibit (GE) 23-B at 16-18.

Mr. Yañez then mentions Mr. Arditti's name, as well as several other El Paso criminal defense attorneys. Yañez testified that he understood Agent Gallman to be requesting an introduction to a criminal defense lawyer (XIII R. 647). Even Gallman testified that in this conversation there was no "meeting of the minds of who we were talking about." (VIII R. 196).

---

[1] It is clear from prior conversation that Gallman is referring to the commercial lawyer who assisted them with the offshore corporation and bank account.

[2] See note 1.

That Yañez recommended Arditti only for criminal defense work, not money laundering, is further supported by the conversation at the next taped meeting, where Yañez specifically tells the agent that Arditti was not recommended by him to help with investments (GE 33A at 25). Gallman testified at trial that it was clear to him that Yañez wanted him to use Arditti for criminal defense matters only (XII R. 451).

2. The Government states that at the September 21, 1988, meeting, Yañez said that he had told Arditti "about the two prior laundering transactions." Brf. Opp. at 3. Yañez states at that meeting that he told Arditti that "we have done two transactions." GE 29A at 4. Mr. Yañez does not mention money laundering to Mr. Arditti.

3. The Government states "Gallman identified several drug dealers with whom he claimed to have been involved . . . ." Brf. Opp. at 3. There is no citation for this statement, and it is not found in the transcript of the conversation in question (GE 29A). In fact, it is Mr. Arditti in detailing his credentials as a criminal defense lawyer, who mentions past clients who were drug dealers (GE 29A at 6).

4. The Government states that all of the meetings between Mr. Arditti and the agent were videotaped. Brf. Opp. at 3, n.1. This is incorrect. The March 30th meeting was not videotaped. It was only partially audiotaped. This is significant because the agent claimed at trial, though not before, that he told Mr. Arditti, in this unrecorded part of the conversation, that the funds were "coke money" and Mr. Arditti could walk away from it (X R. 246-48; Pet. App. at 7).

5. The Government states that at that first meeting, Arditti "advised [the agent] on structuring real estate transactions so as to avoid arousing suspicion. . . . and bypass the banking system with owner financing." Brf. Opp. at 4.

The true conversation that took place is not so simple, and is set forth in the Petition at 7. Most important is Agent Gallman's trial testimony, where he agreed that Arditti's owner financing suggestion did not appear to be a money laundering scheme (XII R. 443-44).

6. The Government states that at the end of the March 30th meeting, "petitioner confirmed that he had 'no qualms, no qualms at all.'" Brf. Opp. at 5. Although the opinion below is cited, this does not appear in the court's opinion. Instead it is the identical misstatement that appeared in the Government's brief below.

Mr. Arditti's quoted remark was made at the *May 2nd* meeting (GE 69-B at 100), in the following context:

Adams: I assume when I come back next week you can present me a bill or something and we'll take care of that.

Arditti: That's right. Absolutely.

Adams: You know I'm good for that. Gabriel knows.

Arditti: Okay.

Adams: Okay?

Arditti: I've got no qualms. None whatsoever.

Not only did the Government attribute this quote to the wrong conversation, it also misleads this Court by

taking it out of the context of the actual conversation. It is clear from the tape that Mr. Arditti has no qualms about presenting a bill, not about the purported illegal source of Agent Gallman's funds.

ARGUMENT

The Government insists that this Court's holding in *Jacobson v. United States*, 112 S.Ct. 1535 (1992), had no impact on the state of the law of entrapment in the Fifth Circuit. Mr. Arditti disagrees, and believes that his case should be considered in light of *Jacobson*.

The two important points made in *Jacobson* that break from prior Fifth Circuit law and impact this case are: (1) the Court held that evidence of predisposition must be evidence of an intent to commit an offense, not simply suspicious behavior; and (2) the Court held that the manner of the defendant's participation in the offense is not relevant if it is *after* inducements by Government agents.

The Fifth Circuit found that Mr. Arditti "jumped in with both feet" and was an "eager, active participant." Pet. App. at 27. The Government relies on those findings without regard to how *Jacobson* may have changed those findings.

It is true that Mr. Arditti made several comments to the undercover agent at the first meeting that could be viewed, in the light most favorable to the Government, as suspicious. However, the Government cannot assert that anything said by Mr. Arditti indicated a desire to commit an illegal act. In fact, the Government acknowledged this

fact in the court below, but argued that the absence of incriminating statements was due to Mr. Arditti's savvy as a criminal defense lawyer, rather than his true lack of desire to commit a crime. Gov't C.A. Br. at 41.

Under the Court's holding in *Jacobson*, statements that are suspicious but do not indicate a willingness to commit an offense are *not* evidence of predisposition. The Fifth Circuit, had it the benefit of the Court's holding in *Jacobson*, would have had to look for evidence of predisposition to commit a criminal offense, which it would not have found in the record.

Further, the Fifth Circuit's finding that Mr. Arditti was an eager and active participant is unreliable because it was based on pre-*Jacobson* law. Mr. Arditti was an eager and active participant in conversations with the undercover agent – obviously he was hoping to get hired in a criminal matter. He jumped into meetings with the agent, again hoping to get legitimate business from the contact. But once the illegal scheme was suggested to Mr. Arditti, it took two and one half months of nagging and pressure from the Government to induce Mr. Arditti to commit the offense.

Jacobson makes it clear that the eventual willing and active commission of a crime, after lengthy inducements by the Government, will not be evidence of predisposition. Just as Mr. Jacobson's eventual purely voluntary purchase of a pornographic magazine could not be bootstrapped to be used as evidence of predisposition, neither can Mr. Arditti's ultimate commission of an offense be considered evidence of predisposition.

Contrary to the Government's assertion, prior Fifth Circuit law is changed by the holding in *Jacobson*. The Fifth Circuit held in *United States v. Johnson*, 872 F.2d 612 (5th Cir. 1989), and *United States v. Nations*, 764 F.2d 1073 (5th Cir. 1985), that predisposition could be inferred from the defendant's ultimate active and eager participation in the offense. This is no longer the case. The Court, in *Jacobson*, recognized that predisposition can be bred by the Government's actions. In *Jacobson*, it was the Government's mailings that were held to have bred the predisposition in Mr. Jacobson. In the present case, it was the much more influential and insidious personal meetings with the agent, and personal contacts by the codefendant (which were made at the agent's behest) that bred the predisposition in Mr. Arditti.

Rather than address the impact of *Jacobson* in this case, the Government has taken the tack *for the first time* that Mr. Arditti was not induced to commit the offense. The Government asserts that Mr. Arditti was merely provided an opportunity to commit the offense. Brf. Opp. at 14, 15. The Government made no such assertion in the court of appeals, nor did the lower court make any such finding. The entire argument has always been whether the government presented sufficient evidence of predisposition, because it has been clear to all parties that Mr. Arditti was induced to commit the offense.

CONCLUSION

The jury could not have inferred, as the Government suggests (Brf. Opp. at 13), that Yañez' introduction of Mr.

Arditti to the undercover agent indicated Yañez' knowledge that Arditti would commit an offense, and therefore was evidence of predisposition. This assertion is based only on the misstatement of facts which are corrected above. Absent that one fact, there is no evidence of predisposition, as that evidence is characterized in *Jacobson*, prior to the agent's contact and inducements.

Rather than address the impact of this Court's holding in *Jacobson*, the Government urges two extraordinary points: (1) it argues that the Court's holding in *Jacobson* has no impact on the law of entrapment in the lower courts; and (2) it asserts for the first time that Mr. Arditti was not induced to commit the offense.

The Government's arguments have no merit and this petition for writ of certiorari should be granted.

Respectfully submitted,

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